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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 CHEVRON CORPORATION,

4 Plaintiff,

5 v.

11 Cv. 0691 (LAK)

6 STEVEN R. DONZIGER, et al.,

7 Defendants.

8 -----x

October 23, 2013
9:30 a.m.

10 Before:

11 HON. LEWIS A. KAPLAN

District Judge

12 APPEARANCES

13 GIBSON, DUNN & CRUTCHER LLP
14 Attorneys for Plaintiff

15 BY: RANDY M. MASTRO
16 ANDREA E. NEUMAN
17 REED M. BRODSKY
JEFFERSON E. BELL
ANNE CHAMPION
GEORGIA K. WINSTON

18 FRIEDMAN RUBIN
19 Attorneys for Donziger Defendants

20 BY: RICHARD H. FRIEDMAN
DEE TAYLOR

21 LITTLEPAGE BOOTH
22 Attorneys for Donziger Defendants

23 BY: ZOE LITTLEPAGE
24 RAINEY BOOTH

25 GOMEZ LLC
Attorneys for Defendants Hugo Camacho, Javier Piaguaje

BY: JULIO C. GOMEZ

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(Trial resumed; in robing room)

MR. MASTRO: Your Honor, I requested this conference in relation to Zambrano document production issues and it may also relate to Mr Guerra. They did not agree to produce Zambrano documents. It may relate to the Guerra cross-examination this afternoon, and we now have new information, both from Sunday's deposition and something that happened yesterday, that I think is important to be addressed forthwith.

THE COURT: What is the issue?

MR. MASTRO: The issue is, not only have they refused to produce Zambrano documents, it is apparent that a report has been produced in Ecuador by a prosecutor's office looking into the charge against Mr. Guerra of incitement of separation. That's the charge.

THE COURT: Is that like alienation of affection?

MR. MASTRO: It's apparently not being patriotic. The prosecutor's office had a, quote unquote, forensic study done of Zambrano's computer, and a report has issued that miraculously the plaintiffs' group, the Frente in Ecuador, got in advance. So they put up on their Web site yesterday the results of this examination.

Now, this comes full circle to Sunday because the questioning on Sunday focused so much on computers in Zambrano's office, and it's apparent that the other side not

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1 only has a press release about it, but they must have the
2 document.

3 Now, they will now have that to cross-examine
4 Mr. Guerra. Zambrano is coming here. This is kind of by
5 ambush. They should have to produce this document to us,
6 because on its face it appears to be a ludicrous examination.
7 The information is provided on the FDA Web site.

8 THE COURT: Do you have it?

9 MR. FRIEDMAN: It may take more than one of us to
10 respond to this.

11 THE COURT: Do you have the document?

12 MS. LITTLEPAGE: No, sir.

13 THE COURT: What about you?

14 MR. GOMEZ: No, your Honor.

15 THE COURT: Patton Boggs?

16 MR. GOMEZ: No, your Honor, they do not. I am
17 informed that the document is not public.

18 MR. FRIEDMAN: We do have something.

19 THE COURT: What do you have?

20 MR. FRIEDMAN: We did learn about this, and we got an
21 affidavit, which I haven't even seen yet, so maybe Ms.
22 Littlepage can talk about it.

23 Well, you should say what it is.

24 MS. LITTLEPAGE: I will tell you my whole
25 understanding, and we were going to raise this with the Court

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1 later today. I was waiting until we got something signed in
2 writing so I can tell the Court exactly what happened.

3 It was our understanding from the lawyers in Ecuador
4 that a proceeding was started against Mr. Guerra. My best
5 understanding is it's similar to a grand jury proceeding, in
6 that the documents created in that proceeding are secret. So
7 we did not know that there was an actual report created, but we
8 did know that there was a forensic study done of Judge
9 Zambrano's computer. It's done by the forensic team of some
10 division of the police department that does forensics.

11 The lawyers in Ecuador met yesterday with the forensic
12 expert who did the analysis. They told us that they would get
13 us a declaration from the forensic expert as to what he found,
14 but they could not produce the official report that he provided
15 to the Ecuadorian court because the report is confidential.

16 We anticipated getting that signed declaration some
17 time today, and we were going to immediately turn it over to
18 Mr. Mastro and do a motion to the Court asking the Court to
19 allow us to amend our witness list and bring this forensic
20 expert. That's all I know.

21 My understanding is that Judge Zambrano's computer was
22 quarantined.

23 THE COURT: This is an examination of Zambrano's
24 computer or of Guerra's computer?

25 MS. LITTLEPAGE: Judge Zambrano's computer. My

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1 understanding is that the forensic experts, and I understand
2 there are two, the Ecuadorian court appointed two so one could
3 review the other one's work, that these two experts have found
4 that the verdict was written on Judge Zambrano's work computer.
5 It's a desktop computer. It was not created on a laptop, like
6 Mr. Guerra says. It was not moved on to his computer by a USB
7 drive. That, in fact, the USB port was not accessed during the
8 time the verdict was written.

9 So there is now evidence that the verdict was in fact
10 written on Judge Zambrano's computer, in his office, in the
11 courthouse, and not as Mr. Guerra -- Mr. Guerra has two
12 different stories. One is that he wrote it on a flash drive
13 one is that he wrote it on a laptop. Neither of those are
14 supported by the forensic evidence. That I hope to have for
15 the Court today.

16 MR. FRIEDMAN: I have one addition. I think our group
17 up here now has a Spanish version affidavit from this expert.

18 THE COURT: Turn it over.

19 MR. FRIEDMAN: We will. Things are happening in this
20 regard that I am not completely up to speed on so I don't
21 want -- we may have that affidavit now.

22 MR. GOMEZ: We do. We have the affidavit and it's
23 signed, and I tried translating it last night.

24 THE COURT: Turn it over in whatever state it's in.

25 MR. MASTRO: All I can say, your Honor, is on their

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1 own Web site yesterday, they posted about the report and its
2 contents, Fajardo's statements about it. They said the
3 judgment file was open on the computer on October 11, 2010,
4 that's the day Zambrano resumed on the case, and remained open
5 continuously for 3,571 hours, which is the equivalent of five
6 months, right through the day of the judgment. This is such a
7 ludicrous report, but we need it. Questioning occurred on
8 Sunday.

9 THE COURT: If they have it, they are going to have to
10 turn it over. If Fajardo has it, it's subject to the order
11 already. It's to be turned over.

12 MS. LITTLEPAGE: We have something. I think we may
13 have brought it in last night signed. I know we have
14 something.

15 MR. FRIEDMAN: It's not the report.

16 MS. LITTLEPAGE: We do not have the report, but we
17 have spoken to the forensic expert.

18 THE COURT: We are going to deal with this in due
19 course. Whatever you have you're going to turn over. I am not
20 now ruling on what is going to happen, with respect to whether
21 these witnesses are going to take the stand, with respect to
22 anything else. I am just saying turn it over. In your own
23 best interest turn it over.

24 MS. LITTLEPAGE: It was our intention all along.

25 MR. MASTRO: I brought it up. They didn't.

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1 MR. GOMEZ: If I may add one more point. If memory
2 serves, Enrique Carvajal, who is Adolfo Callejas' associate, is
3 an attorney of record in that proceeding.

4 THE COURT: In which proceeding?

5 MR. GOMEZ: The one dealing with the complaint --

6 MR. MASTRO: Has been unable to get the report.

7 THE COURT: Would you stop interrupting, Mr. Mastro?

8 MR. GOMEZ: My understanding is Mr. Carvajal is an
9 attorney of record. He represents some party in that
10 proceeding and has been privy to its developments. So I think
11 the claim that this is totally out of left field and there is
12 virtually no knowledge about it is belied by the fact that Mr.
13 Callejas's associate is attorney of record in the case.

14 THE COURT: Maybe, maybe not. I don't know if he is
15 attorney of record. I don't know what it would mean if he is.
16 That's where we are.

17 MS. LITTLEPAGE: It's our understanding that the
18 person that worked for Mr. Chevron, Mr. Carvajal, has been
19 present at these proceedings. Obviously, we have not been
20 present at the proceedings. But what we have we intended to
21 give them as soon as we got a signed copy, and then we will
22 file the appropriate motion and raise the issue with your
23 Honor.

24 THE COURT: All right. That takes care of that.

25 Now, as long as you're in the robing room, I am going

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1 to take one more minute. This is a bench trial, whether you
2 like it or not, that's what it is. It is not for either side
3 an occasion to produce material for press releases, which if
4 they are fair and true reports of papers filed here or
5 statements made, are not subject to libel suits.

6 The name of the game here is to put the evidence
7 before me in the most efficient way. That does not include
8 repeating it endlessly. It does not include endless
9 examination of witnesses by either side about stuff that is
10 undisputed, stuff that the witnesses don't know anything about,
11 that would be competent testimony. It does not include stuff
12 that you want to emphasize for the press or for somebody else.
13 The exercise is to bring to my attention that which is not
14 otherwise there. I will hear closing argument in this case,
15 not long, but I will. You will have post-trial briefing to
16 make all your points. But it is essential that both sides get
17 down to business and get the possess of putting the evidence I
18 need in here efficiently.

19 We have had a lot of trouble, especially yesterday,
20 but not only yesterday, because both sides are paying very
21 little attention to this. I have already made my views clear
22 on that. The fault lies with both sides. And it has to stop.
23 When you guys do it appropriately, the testimony comes in
24 without any objections, without any interruptions. And when
25 you depart from it, that's when the trouble starts, and there

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1 is no reason for it. I understand what the issues in this case
2 are.

3 Now, I had no idea, Mr. Gomez, that you folks were
4 short of space outside the courtroom here. I obviously
5 believed to a degree the argument that it was just you and Mr.
6 Donziger. Obviously, it was not just you and Mr. Donziger.
7 And obviously Chevron is here with more lawyers than you can
8 shake a stick at. So the obvious thing was done by my deputy
9 in terms of space. I haven't got any other space. I will see
10 whether we can scare up some more space for you. I will do the
11 best we can.

12 I am not now deciding what I am going to do about the
13 Does, but it's not inappropriate to tell you that I am somewhat
14 skeptical that there is any way for the defense to have an
15 adequate investigation that would fully ensure the anonymity of
16 the two Doe witnesses. I will, if push do it, ultimately rule
17 on it, but we may come to a point where they are either going
18 to have to decide that they are going to come and testify or
19 that they are not. We may get there.

20 That's not to say there might not be some measures of
21 a protective nature, if they were to come and testify, and some
22 limitations on what the defense could do with their identities.
23 But I am very troubled by the fairness question about allowing
24 adequate preparation by the defense, and you should just know
25 that I am thinking about it actively. It's a very difficult

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1 problem.

2 Now, Mr. Donziger's testimony. He is to prepare a
3 witness statement. Before that gets filed, Mr. Friedman, you
4 are to do what Mr. Mastro should have done. It is not to be
5 Mr. Donziger's account of the history of the world as it
6 relates to Ecuador. It is to be facts on personal knowledge,
7 without argument, without supposition. It's got to be, as it
8 would be on a motion for summary judgment, facts that would be
9 admissible in evidence if testified from the stand. I will let
10 you, if it's necessary, supplement it with direct testimony.
11 The same stricture as to that. No speeches, responsive answers
12 to proper questions, evidence, not PR.

13 MR. FRIEDMAN: I understand.

14 Could I say one thing as to that?

15 THE COURT: What?

16 MR. FRIEDMAN: I have been thinking about this issue a
17 lot.

18 THE COURT: I assumed you were.

19 I will tell you both, you and Ms. Littlepage, that you
20 have been a breath of fresh air in this case, and I am
21 appreciative of it.

22 MR. FRIEDMAN: For this purpose, the one difference
23 between Mr. Donziger and the other witnesses is that his state
24 of mind is actually critical.

25 THE COURT: His state of mind on some things is

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1 certainly critical, and I understand that.

2 MR. FRIEDMAN: I am not saying that justifies a tirade
3 about the economic inequalities in Ecuador. All I am saying is
4 there are things that he saw or observed that he says resulted
5 in him doing certain other things, and I don't know how to -- I
6 guess what I am saying is I think, using my best good faith
7 efforts to respond to all the things that have been said about
8 him in this trial, and will be said, there is going to be
9 things that the Court or certainly Chevron thinks should not be
10 in that statement, but I clearly understand what you're saying,
11 and I am going to do my best to keep it down.

12 THE COURT: On this as with all other statements, I
13 want you to talk beforehand so that I don't wind up starting
14 the day of his testimony with an hour or two or three fighting
15 about which parts of the statement get cut out, as we did
16 yesterday or the day before, or last week, whatever it is. You
17 know what I am referring to. I am not faulting you for raising
18 those points. I went with you with every one of them. But you
19 see what I am getting at. I accept the good faith on your part
20 and on the other side.

21 Obviously, the tempers on both sides -- I am not
22 saying this of you, Mr. Friedman, but your predecessors -- have
23 been like nothing I have ever seen in 40-plus years of
24 practicing and being on the bench. Nothing. I have never seen
25 anything like it. And it has caused both sides to behave in a

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1 way that I have often thought would appall the wives and loved
2 ones of all of the actors if they understood what was going on.

3 MR. MASTRO: Please don't tell my wife.

4 THE COURT: They appall me. Let's just leave it at
5 that.

6 So let's try to make a break with the past on that and
7 get this done in a businesslike way. I know there are
8 difficult issues in this case. I have known it from the
9 beginning. Nobody remembers that in the preliminary injunction
10 ruling I did not find a probability of success on the fraud.
11 Mr. Donziger seems to tell the world otherwise I guess, but I
12 did not. I know what the issues are, and they are important
13 and serious. I think I know just what they are, and to the
14 extent I don't, you will educate me.

15 MR. FRIEDMAN: Your Honor, if I could just add one
16 last point on the Doe issue. I appreciate your comments about
17 that and the difficulties you are balancing. I am sure you
18 know this, but I just want to say it anyway, which is every day
19 that goes by makes it harder for us --

20 THE COURT: I am aware of that. I am very aware of
21 that. And I know that the clock has a bearing here. But there
22 it is.

23 MR. FRIEDMAN: Understood.

24 THE COURT: The fact that it's a nonjury case could,
25 if we need it, give me a little flexibility there that I

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1 wouldn't have with a jury. So we will just see how that plays
2 out.

3 It is equally true that it is not every case where the
4 defendant knows the identity of every witness against him or
5 her. It just isn't. There are only rare instances where that
6 happens, but it happens, and properly happens, as you all know.

7 That's it. How long are we going to go with Dahlberg?

8 MR. FRIEDMAN: An hour.

9 MR. GOMEZ: 20 minutes.

10 THE COURT: We are going to get to Guerra sometime
11 this morning.

12 MS. LITTLEPAGE: May I raise one thing with Mr. Guerra
13 so we don't have the press listening in on some of this?

14 THE COURT: They will just read it.

15 MS. LITTLEPAGE: At least it will be a day later.

16 Chevron has provided a witness statement, although
17 Mr. Guerra will be testifying live, which was very helpful.
18 There are two particular areas that cause me some concern that
19 I wanted to raise with the Court. There's lots of discussions
20 in Mr. Guerra's statements about conversations he had with
21 Judge Zambrano, what Judge Zambrano told him, which are
22 hearsay. But there are two particular discussions -- some are
23 not. I researched all last night to try to understand them.
24 There are two particular things that are very troubling that I
25 would like to object to, and I would like to raise it now so

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1 the Court can give me some guidance.

2 On two occasions Mr. Guerra says, Judge Zambrano told
3 me that he had reached a deal with the plaintiffs to get money
4 for writing orders in their favor in the first instance, and
5 then for delivering a verdict to them in the second instance.
6 I think those two specific comments, where Judge Zambrano says
7 them to Mr. Guerra, are rank hearsay. And because Judge
8 Zambrano is going to be here testifying, none of the exceptions
9 would apply to them, and those two specific comments that are
10 his statement I would object to and ask to be stricken. I
11 wanted to raise it beforehand because I didn't want them to ask
12 an open-ended question in the courtroom and Judge Guerra
13 blurted out, and then I have to object afterwards. I know it's
14 not a jury trial, but those are two particular issues that are
15 in his witness statement that I have concerns with.

16 THE COURT: I understand. I was anticipating this for
17 quite some time and your answer I am sure I know, but what is
18 your answer?

19 MR. MASTRO: The exchanges both with what Zambrano
20 said and what he attributes to Fajardo are both in the category
21 of nonhearsay or exceptions to hearsay, co-conspirators and
22 admissions against interest. So I think they clearly come in
23 under these circumstances and the Court should hear them.

24 Again, what we are doing today, and we agreed upon the
25 procedure, he has done his normal witness statement. We have

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1 made similar redactions, your Honor. We are going to do a
2 direct examination of him in addition to his witness statement
3 being received on the questions of his ghost-writing for Judge
4 Zambrano and his role in the judgment ghost-writing and bribery
5 solicitations. So we will be covering the very areas on a
6 direct examination that will supplement the declaration.

7 MS. LITTLEPAGE: My response is, Judge Zambrano is not
8 listed or named as a co-conspirator, named or unnamed.

9 THE COURT: It doesn't matter.

10 MS. LITTLEPAGE: In the complaint, in fact, there are
11 no allegations at all of the bribery. The complaint was never
12 amended to plead with any specificity any of the allegations
13 that Mr. Guerra is making now. I am just keeping my record. I
14 believe it's rank hearsay, and I don't believe it matches an
15 exception.

16 THE COURT: I am not going to express any views with
17 respect to the statement against interest argument now, though
18 I may in due course. But my understanding of the law, and if
19 somebody wants to submit anything on this if I am mistaken in
20 your view, you will tell me, or you're at liberty to do it.
21 But my understanding of the law is that the co-conspirator rule
22 applies even in a circumstance where the declarant, which in
23 this case is Zambrano, is not charged with the offense. It
24 applies whenever there is a conspiracy or concerted action
25 between the declarant and the witness and the statement is made

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1 in furtherance of the object of that conspiracy.

2 Now, on the face of Guerra's declaration, he says, in
3 substance, that there was indeed a conspiracy. There was a
4 conspiracy at least between himself and Zambrano to extract a
5 bribe in exchange for allowing the plaintiffs to write the
6 judgment. Guerra had a role in that, both vis-a-vis initiating
7 the contact and dealing with the draft judgment, and Zambrano's
8 communication to Guerra was certainly in furtherance of the
9 plan because he was telling Guerra, OK, we have a deal, and
10 you're going to do some of the work, and we are going to get
11 this draft from the plaintiffs. That's a rough summary. I
12 don't have the paper in front of me.

13 Now, the question whether it's admissible as a
14 co-conspirator declaration is a question of competence. It's a
15 preliminary issue of fact for the judge. I think it comes
16 under Rule 104(b) of the Federal Rules of Evidence, and it is
17 up to me to find, as a threshold to admissibility, that there
18 was a conspiracy, at least to that extent, and that the
19 declaration was in furtherance of it.

20 That obviously depends on who I believe ultimately.
21 So in the first instance those statements, unless you can show
22 me law to the contrary, will come in as they do in all criminal
23 cases, subject to connection, and I will ultimately make a
24 finding about whether they were in furtherance and whether
25 there was the conspiracy. That's my rough understanding of the

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1 law as we sit here now.

2 MS. LITTLEPAGE: Just for the record, obviously this
3 is very prejudicial. Certainly, as to the conversation of
4 Judge Zambrano telling Mr. Guerra allegedly that he had reached
5 a deal with the plaintiffs as to writing the verdict, there is
6 no corroboration that that's true. Guerra is not listed as a
7 co-conspirator. Mr. Zambrano is not listed as a co-conspirator
8 in the complaint. So we have got two nonlisted co-conspirators
9 in the complaint talking about something that has no
10 corroboration to it.

11 THE COURT: I got that the first time you said, except
12 the corroboration point, and I am not aware of a shred of
13 evidence that says that a co-conspirator declaration is not
14 admissible unless it's corroborated -- a shred of law is what I
15 meant, not evidence.

16 You will enlighten me if I misunderstand this. In any
17 case, it's not anything I have to decide before I decide the
18 case.

19 MS. LITTLEPAGE: Do I need to object further or have I
20 preserved? Do you want me to object in the courtroom?

21 THE COURT: As to the two statements that you have
22 raised specifically, you have made your record.

23 MS. LITTLEPAGE: Thank you, Judge.

24 MR. MASTRO: We are going to be handing out disks for
25 you today. All the deposition designations in our case, their

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1 objections, their cross and counterdesignations, you will have
2 all of that with each side's objections. We will have the new
3 booklets -- they are in more than one box -- left with your
4 courtroom deputy. So you will have the complete set now with
5 each side's objections. We agreed that once received by your
6 Honor, like we do with witness declarations, that we e-file
7 both what we put into the record and the objections.

8 Thank you, your Honor.

9 (Continued on next page)

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1 (In open court)

2 THE COURT: Good morning, everyone.

3 TROY DAHLBERG, resumed.

4 THE COURT: OK. The witness is reminded he is still
5 under oath.

6 You may proceed, Mr. Friedman.

7 MR. FRIEDMAN: Thank you, your Honor.

8 CROSS-EXAMINATION (Cont'd)

9 BY MR. FRIEDMAN:

10 Q. Mr. Dahlberg, can you tell us how much Chevron has been
11 charged for your firm's work on this case?

12 A. A little under \$5 million.

13 Q. Who have you primarily worked with at Gibson Dunn on this
14 project?

15 A. Ms. Winston, Mr. Marick and Ms. McCoy.

16 Q. Have you worked with any people who were not in either your
17 firm or the Gibson Dunn firm on this project?

18 A. No.

19 Q. Have you worked on other projects with Gibson Dunn in the
20 past?

21 A. Yes.

22 Q. About how many?

23 A. One.

24 Q. What was that case?

25 A. I don't have a clear recollection, but it didn't last very

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Dahlberg - cross

1 long, and it was probably about maybe 12 years ago, 13 years
2 ago. So it wasn't a very large matter.

3 Q. On this project, who was responsible for getting you the
4 records that you used and analyzed the financial transactions?

5 A. Ms. McCoy.

6 Q. Who is she?

7 A. She is an attorney at Gibson Dunn.

8 Q. You did no independent investigation of the availability of
9 documents?

10 A. I guess for clarification sake, I can tell you what I did.

11 Q. Sure.

12 A. So I asked for all transactional financial records that
13 they had relating to this matter.

14 Q. But you didn't go out on your own to verify that, for
15 example, this was all that Gibson Dunn had?

16 A. No.

17 Q. If I understand what you're saying correctly, you're not
18 saying that you reviewed all the documents produced by Mr.
19 Donziger in this litigation?

20 A. I don't know, because we made the request for all
21 information that related to financial accounting transactional
22 records, and if they produced everything to us that they
23 received related to that, I don't know.

24 Q. You're a member of the American Institute of Certified
25 Public Accountants?

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Dahlberg - cross

1 A. Yes.

2 Q. Bound by that group's ethical code?

3 A. Yes.

4 Q. And that code requires that you only render opinions when
5 you have sufficient relevant data to afford a reasonable basis
6 for your conclusions?

7 A. That's the consulting standard. It's kind of a general
8 standard, but that's the consulting.

9 Q. That would apply in this situation, wouldn't it?

10 A. Yes.

11 Q. Even if you're acting in a forensic matter, the code
12 requires that you have sufficient relevant data to afford a
13 reasonable basis for your conclusions?

14 A. Yes.

15 Q. If there is not sufficient data to afford a reasonable
16 basis for your conclusion, you're bound by the code to tell us
17 about that?

18 A. I think I am probably bound not to make the opinion.

19 Q. As a forensic accountant, you should not be engaging in
20 speculation, would you agree?

21 A. At some level of your investigative aspect, when you don't
22 have a lot of information, you have to sort of gather things
23 along. I don't know if you call that speculation, but you go
24 through levels of gathering evidence, and then your opinions
25 become more or less certain and ultimately depending on all the

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Dahlberg - cross

1 evidence you look at.

2 Q. Well, is there a difference between the level of certainty
3 that an accountant needs in auditing a company than an
4 accountant needs say when providing an opinion in court?

5 A. Possibly.

6 Q. Did you engage in speculation in this case?

7 A. No.

8 Q. Would you believe that a forensic accountant should be
9 basing opinions on unconfirmed or unreliable information?

10 MS. WINSTON: Objection, your Honor. Form.

11 THE COURT: Sustained.

12 Q. Did you base opinions in this case on unconfirmed or
13 unreliable information?

14 MS. WINSTON: Objection, your Honor.

15 THE COURT: Overruled.

16 A. I guess you would have to define -- I don't think anything
17 was unreliable, but unconfirmed I don't quite understand.
18 There are different levels of confirmation you could have
19 depending on the type of evidence you are looking at. So I
20 would need a further definition.

21 Q. Let me ask you this. Would you agree that a forensic
22 accountant should not state or imply to someone who has acted
23 fraudulently without solid evidence to support that conclusion?

24 A. I would agree with that.

25 Q. I looked at your various summary charts. Did you do any

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Dahlberg - cross

1 analysis of when different amounts of funding were received?

2 A. Yeah. There were a couple of different analyses that
3 involved timing aspects specifically. Generally speaking, we
4 tried to sort information out at times by when the times came
5 in because we wanted to match things to time amount to sort of
6 see what the interrelationship was between the documents we
7 were looking at.

8 Q. Is there some summary charts showing the dates in which
9 funding was received?

10 A. I don't believe in this there is a summary chart. In my
11 final opinion, there is a summary chart, as far as when funding
12 was received. The only one in here I have is by the individual
13 entity that the funds came by.

14 Q. Likewise, did you do a summary chart indicating when
15 expenditures were made?

16 A. That's not -- there is one chart in here about certain
17 expenditures in time, and then there's other charts that are
18 just by an individual or entity.

19 Q. But not a summary chart showing when different amounts were
20 spent for different entities?

21 A. You're talking about in my testimony?

22 Q. In your direct.

23 A. There is not an overall for all distribution.

24 Q. Do you have your direct testimony up there with you?

25 A. I do.

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Dahlberg - cross

1 Q. Would you mind turning to page 16, which for the record is
2 also Plaintiff's Exhibit 2143?

3 THE COURT: You're talking about Plaintiff's Exhibit
4 4900, page 16, right?

5 MR. FRIEDMAN: Yes.

6 Q. Mr. Dahlberg, on this chart you have a list of people or
7 entities that provided funding, is that right?

8 A. Well, not exactly. Yes and no.

9 Q. Tell me the yes and then tell me the no.

10 A. So as you can see, there's three columns, but two columns
11 that have numbers. There is a center column and a far right
12 column.

13 In the center column, that is actually amounts of
14 money that were actually we were able to confirm that were
15 actually received or paid as funding. In the far right column
16 is commitments, so that is more documentation surrounding
17 amounts of money that people appear to be committing that they
18 were going to fund at some point in time.

19 Q. Then if we just go real quickly to page 35, this is also
20 marked as Plaintiff's Exhibit 2137. This is your summarization
21 of spending, is that right?

22 A. That is correct.

23 Q. So if we go then back to page 16 -- actually, if we
24 could -- you actually talk about on page 4 and 5 of your direct
25 testimony things that you refer to as potential indicators of

DAN8CHE1

Dahlberg - cross

1 fraud, correct?

2 THE COURT: Presumably it says whatever it says, Mr.
3 Friedman.

4 Q. Have you listed out for us what you viewed as potential
5 indicators of fraud?

6 A. Yes.

7 Q. Those include inadequate documentation to support
8 transactions, etc.?

9 A. Yes.

10 Q. So if we go to page 16 of your report, does your review of
11 the Kohn Swift records indicate that Kohn Swift kept inadequate
12 documentation to support the financial transactions it engaged
13 in?

14 A. I didn't do an analysis as to whether Kohn Swift & Graf had
15 adequate records or not for the litigation.

16 Q. Did you do an analysis of Kohn Swift on your second indicia
17 of fraud, incomplete and/or unclear accounting records relating
18 to those accounting records?

19 MS. WINSTON: Objection. Asked and answered.

20 THE COURT: Sustained.

21 MR. FRIEDMAN: This is a separate category in the
22 potential fraud. He has got five of them.

23 THE COURT: Yesterday he testified, as I remember,
24 that he never looked at Kohn Swift's records.

25 Whether you testified to it or not, is that true?

DAN8CHE1

Dahlberg - cross

1 THE WITNESS: Unless they were produced with Mr.
2 Donziger's records, that's true.

3 THE COURT: Let's leave that. He was not auditing
4 Kohn Swift. He was looking at the paper that Mr. Donziger
5 produced.

6 Q. So you're not saying that any of these investors that you
7 listed on this chart have any of the indicators of fraud that
8 you list in your report?

9 THE COURT: He didn't speak of indicators of fraud.
10 He said potential indicators.

11 Q. None of these investors in your review demonstrated
12 potential indicators of fraud, is that right?

13 A. I didn't offer an opinion in this testimony regarding the
14 investors and whether or not there were indicators of fraud
15 relating to the investors, the investors' records.

16 Q. Would you agree that you have not formed any opinion or
17 conclusion that any of these people or organizations engaged in
18 fraud, any of the ones on this list?

19 A. We are referring back to page 16, I guess, Exhibit 2143?

20 Q. That is correct.

21 A. I didn't form an opinion as to the investors and their
22 actions related to whether they had any fraudulent conduct.

23 Q. As to the right-hand column then, you started to tell us
24 about that. In the commitment amounts, you're not intending to
25 suggest that the amounts in the right-hand column were actually

DAN8CHE1

Dahlberg - cross

1 received, other than to the extent they are reflected in the
2 middle column?

3 A. That is correct.

4 Q. So, for example, with the Burford money, you know for a
5 fact that Burford never paid out 15 million to support the
6 lawsuit, correct?

7 A. Actually, I don't know that for a fact.

8 THE COURT: Maybe we can save an awful lot of time.

9 Mr. Dahlberg, I understand from your statement that
10 what you did is you asked for all of the financial transaction
11 documents that Mr. Donziger had given Gibson Dunn. Is that
12 true so far?

13 THE WITNESS: That's correct.

14 THE COURT: Then Gibson Dunn gave you what I imagine
15 was a big pile of papers, right?

16 THE WITNESS: A lot, your Honor.

17 THE COURT: And you went through those papers and you
18 basically added up whatever you thought relevant or whatever
19 you were asked to add up, and you have set forth the results of
20 your review of as much as he gave you, as much as you got?

21 THE WITNESS: That's generally correct, your Honor.

22 THE COURT: You're offering no opinions about anybody
23 else, first of all, other than Mr. Donziger, is that true?

24 THE WITNESS: There are some transactions involving
25 other individuals that we do talk about, for instance, Mr.

DAN8CHE1

Dahlberg - cross

1 Cabrera and Mr. Reyes.

2 THE COURT: But not any of the investors in the
3 lawsuit, is that true?

4 THE WITNESS: That's correct.

5 THE COURT: And not any defendant in the lawsuit
6 except Mr. Donziger, is that also true?

7 THE WITNESS: That's correct.

8 THE COURT: The boundaries of whatever you can say
9 here depends upon how truthful, accurate and complete the
10 information that you were given to work from was, is that true?

11 THE WITNESS: That's completely correct.

12 THE COURT: If there is anything else that needs to be
13 gone into on cross-examination, let's go immediately to it.
14 OK?

15 MR. FRIEDMAN: Yes, your Honor.

16 BY MR. FRIEDMAN:

17 Q. To clarify then on the commitment amounts, you are not
18 saying that any of those amounts were actually paid?

19 MS. WINSTON: Objection.

20 THE COURT: He already said that.

21 Look, instead of belaboring the obvious, you're saying
22 that you saw evidence in the documents you were given that
23 \$15.99 million was actually contributed. That's what you saw,
24 is that accurate?

25 THE WITNESS: That's correct.

DAN8CHE1

Dahlberg - cross

1 THE COURT: And maybe other money was contributed, but
2 you didn't see any evidence of it, is that right?

3 THE WITNESS: Yes.

4 MR. FRIEDMAN: Thank you.

5 BY MR. FRIEDMAN:

6 Q. If we go to page 35 of your report, you were able to
7 confirm payments of approximately \$7 million, is that right?

8 A. Yes.

9 Q. And this is just a summary. Obviously, you break it into
10 smaller pieces in the subsequent pages. But you specifically
11 excluded from your analysis moneys spent on services, is that
12 right? And I am using services to include things like -- maybe
13 that's the wrong term -- airfare, hotel, lodging, phone bill.

14 A. I think in professional parlance, it would be like
15 out-of-pocket expenses. So you're talking travel, food,
16 lodging, that's correct, those were excluded.

17 Q. Those were excluded not just for Mr. Donziger, but other
18 individuals who may have been working on the case?

19 A. No, not always. As a matter of fact, I actually think
20 generally they probably were actually included for some of the
21 other individuals, because we just went off of invoice totals
22 for a lot of other folks. Mr. Donziger's invoices were
23 specifically for his hours, and usually he had a separate
24 request for payment for what we call out-of-pocket expenses.

25 Q. I am looking at the bottom of page 13 of your report then.

DAN8CHE1

Dahlberg - cross

1 I am specifically referring to paragraph 33. Let me just ask
2 you, was there any rule of decision, if you will, that
3 determined when you would and would not capture various
4 expenses, such as airfare, hotel, lodging, and things of that
5 kind?

6 A. The general rule was that if we could see an invoice coming
7 from a third party entity, and there was sort of a total amount
8 in that invoice, we attributed that to the entity that that
9 invoice came from. So if Stratus, as an example, had an
10 invoice for, let's say, hypothetically, \$50,000, we put that in
11 the Stratus payment bucket, and this was moneys that were paid
12 to Stratus. So we didn't try and break down from there if
13 Stratus paid like other consultants or other out-of-pockets
14 from there.

15 As I explained with Mr. Donziger, it was a bit easier
16 because he didn't combine his out-of-pockets almost all the
17 time with his other hourly fees like most normal billings would
18 be. They were completely separate. So we were able to
19 separate those. It was only for him that we did that.

20 Q. If I understand what you're saying then, you did not
21 capture his expenses separately?

22 A. His expenses relating to these out-of-pocket things I am
23 talking about, yes.

24 Q. I will ask you the same question as to the chart on page
25 35. The print is kind of small here in the footnote. But it

DAN8CHE1

Dahlberg - cross

1 sounds like what you're saying under evidence of payment is
2 that could also be categorized as unconfirmed evidence of
3 payments?

4 MS. WINSTON: Objection. Vague.

5 THE COURT: Sustained.

6 What did you mean by evidence of payment?

7 THE WITNESS: That we saw evidence that a payment was
8 made.

9 Q. But it was unconfirmed, yes?

10 A. No. The evidence we saw was confirmed. We saw the
11 evidence. But it's not confirmed in the sense that we defined
12 confirmed, which we actually define in footnote 1, which is
13 actually moneys going through a financial institution, like a
14 bank account, where you see money coming in and out of a bank
15 account. In that definition of confirmed, it wasn't confirmed.

16 Q. So as I understood your report, the unconfirmed of evidence
17 of payment could be an e-mail for example?

18 A. Our the report says an e-mail is evidence of payment.

19 Q. So if you saw an e-mail about a payment, that would support
20 you putting an entry in the far right-hand column?

21 A. It could support it. Again, we were looking at 10, 20,000
22 documents. So what we did was we actually tried to compare as
23 much as we could a whole different type of set of records, it
24 might be an e-mail, it might be a bank statement, it might be a
25 retainer agreement, all sorts of different things. And then we

DAN8CHE1

Dahlberg - cross

1 did our best to put this all together because there really
2 wasn't any accounting system that I can go to to figure out
3 what the disbursements were. So then we tried to piece
4 together what those were to figure out what evidence we had
5 would be the best evidence of a payment.

6 (Continued on next page)
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DANLCHE2

Dahlberg - cross

1 Q. And if you -- what I'm trying to understand is your
2 distinction between confirmed and unconfirmed evidence of
3 payment.

4 A. I don't think I have a distinction between unconfirmed
5 because that's not a term I'm using in my report. I have a
6 distinction between what we refer to as evidence of payment
7 versus a confirmed payment.

8 Q. I'm reading your footnote here, as such, evidence of
9 payment is an approximate representation of all transactions
10 whether confirmed or unconfirmed.

11 THE COURT: Yes, but that -- you read only part of it.

12 MS. FRIEDMAN: I did.

13 THE COURT: Look, Mr. Friedman, maybe I'm missing
14 something, but it seems clear as a bell to me. His footnote
15 says that he included as confirmed transactions and transfers
16 that he was able to reconcile to documents from financial
17 institutions, for example, wire transfer records, canceled
18 checks, or bank statements.

19 MS. FRIEDMAN: Yes.

20 THE COURT: Other than that, other than things he
21 could reconcile through a bank statement or the other items he
22 mentioned, he treated all other transactions where he had a
23 shred of evidence, whatever it might have been, that a payment
24 was made though not reconcilable to a bank statement and so
25 forth as evidence of payments. I'm not getting where you're

DANLCHE2

Dahlberg - cross

1 going with this.

2 Q. Well, is that correct, Mr. Dahlberg?

3 A. That's completely correct.

4 Q. All right. So just the slightest shred of evidence gets
5 something on the evidence of payments column the way you did
6 your analysis?

7 A. I'm not sure how you're defining slightest shred of
8 evidence.

9 Q. Take out the --

10 THE COURT: Is this ultimately important to anything
11 in this case, Mr. Friedman?

12 MS. FRIEDMAN: Ultimately you'll determine that, your
13 Honor.

14 THE COURT: Yes, but that would be true if you were
15 offering here the Manhattan classified pages, but we're not
16 going to do that.

17 MS. FRIEDMAN: I'm not offering anything, your Honor.
18 This is their material.

19 What I'm honestly, your Honor, all I'm trying to
20 establish here is that this is not standard accounting, the
21 email, something written on a napkin, basically any kind of --

22 THE COURT: Look, Mr. Friedman, it all depends what
23 standard accounting is.

24 Is anything in here a certification or an opinion by
25 you as a certified public accountant that the books and records

DANLCHE2

Dahlberg - cross

1 here fairly present the financial condition of any company,
2 entity, or person?

3 THE WITNESS: No, it does not, your Honor.

4 THE COURT: Okay. Are you claiming you did any audit
5 of anything in accordance with generally accepted auditing
6 standards?

7 THE WITNESS: I am not, your Honor.

8 THE COURT: But what you did is you took the paper you
9 were given and you added up various things and put them in
10 charts, for whatever that's worth, right?

11 THE WITNESS: Yes.

12 THE COURT: Could we now proceed.

13 BY MS. FRIEDMAN:

14 Q. The charts, Mr. Dahlberg, are titled enterprise, as in
15 summary of enterprise spending.

16 What was your understanding of what the enterprise
17 was?

18 A. So my understanding of the enterprise was sort of all the
19 activities that related to the Lago Agrio litigation. So that
20 would be just generally the activities surrounding the actual
21 conducting of the litigation, the media, the publication, the
22 lobbying, the financing. Pretty much the things that I believe
23 Mr. Donziger seemed like he was in charge of. I think it was
24 his master services agreement or retainer agreement that he
25 actually executed with the Frente members of the LAPs,

DANLCHE2

Dahlberg - cross

1 representatives of the LAPs.

2 Q. So you reviewed activity on a case, not -- let me take this
3 in smaller pieces.

4 I'm understanding then that you reviewed economic
5 activity related to the prosecution of the case; is that
6 correct?

7 MS. WINSTON: Objection, form.

8 THE COURT: I'll allow it.

9 A. I think it was actually much broader than that. I reviewed
10 economic activity that Mr. Donziger was engaged in that was
11 related to the case or related to the operations and the
12 activities -- financing, disbursements, you know, anything that
13 he was doing that was I guess in furtherance of the case.

14 Q. Okay. And but you were not doing an analysis of a
15 particular business, corporation, partnership, something of
16 that kind, a distinct legal entity?

17 A. I guess I'm confused by your question because it was like
18 multiple parts.

19 Q. You did not do an accounting analysis of a distinct legal
20 entity?

21 A. No, I think it was -- there were legal entities involved
22 with this all over the place. But I think what Mr. Donziger
23 was running I never saw as anything other than just his
24 operations and what he had agreed to do under agreements and
25 that kind of thing. That's basically what I was looking at.

DANLCHE2

Dahlberg - cross

1 Q. Sure. So, and I think you've already indicated many
2 entities, distinct entities, engaged in activity in this case,
3 yes?

4 A. Many entities.

5 Q. All right.

6 THE COURT: Mr. Friedman, is the source of this
7 concern over the use of the word enterprise?

8 MS. FRIEDMAN: That's a big part of it, your Honor.

9 THE COURT: Okay. Do you have any idea whether or not
10 enterprise is a legal term of art?

11 THE WITNESS: I do, your Honor.

12 THE COURT: And were you using this or attempting to
13 use that word in any way that was intended to be consistent
14 with your understanding, whatever that may have been, as to
15 that legal term of art?

16 THE WITNESS: No, your Honor. I was using the
17 business sense of what enterprise is.

18 Q. And let me ask you this then: What's the period of
19 time for which you had records, approximately, from what year
20 to what year?

21 A. Are you talking about the time when the record was created
22 as opposed to the time that the record might actually have
23 information about activity in other points in time? You
24 understand what I'm saying?

25 Q. I don't actually, no.

DANLCHE2

Dahlberg - cross

1 A. So let me give an example. There is a Excel spreadsheet
2 that the Kohn firm prepared and it has financial activity in it
3 that I think goes back to '93 or something like that, but I
4 don't believe it was prepared in '93. So in some sense I have
5 records that relate to financial activity that are much later
6 than the actual date of the record itself. So I guess that's
7 the clarification I'm seeking.

8 Q. I understand. So how far back does your data go, whether
9 it was created that far back or not?

10 A. You know, I think it's probably the early nineties. I know
11 that schedule I think went to '93.

12 Q. Let me focus in on the period from 2003 to 2009. You
13 indicated in your report that your understanding was that the
14 Kohn firm was primarily responsible for providing financing for
15 the case?

16 A. Again, with your question, I'm sorry, are you asking me if
17 they were providing financing during that period or they were
18 primarily providing financing during the whole matter?

19 Q. From 2003 to -- I'm just focusing in on 2003 to 2009.

20 A. Well, there clearly is financing from Mr. DeLeon, as well
21 as the Kohn firm, and there might even be some Torvia stuff
22 just beginning at that point in time. I think the period
23 you're talking about the Kohn firm probably put in the most
24 amount of money during that period of time.

25 Q. If you could turn to page 18 of your report. The second to

DANLCHE2

Dahlberg - cross

1 last line, during the period 2003 through 2009, KSG provided
2 financing for the matter and Donziger was primarily responsible
3 for the oversight of the litigation, etc.

4 Is that correct?

5 A. Yes.

6 Q. All right. And during this time, your opinion was that
7 Mr. Donziger may have facilitated expenses paid by KSG, but KSG
8 paid these expenses, correct?

9 MS. WINSTON: Objection, form, and mischaracterizes
10 the testimony.

11 THE COURT: Sustained as to form. At an absolute
12 minimum, it's compound.

13 Q. If we go to page 19 of your report, paragraph 37.

14 THE COURT: Mr. Friedman, is what you're trying to get
15 at this -- I'm just trying to help you.

16 MS. FRIEDMAN: Appreciate the help.

17 THE COURT: From the records you saw, were the
18 payments that you've attributed to the Kohn firm made by the
19 Kohn firm or were they made by somebody else or both? What was
20 the flow of funds?

21 THE WITNESS: The flow of funds normally, your Honor,
22 were from the Kohn firm to like a vendor or third party, Selva
23 Viva, in some situations the flow was to Mr. Donziger and then
24 that vendor or third party. So it wasn't always consistent.

25 THE COURT: Okay. Thank you.

DANLCHE2

Dahlberg - cross

1 Q. And you referred in your report to the fact that
2 Mr. Donziger would facilitate that flow of funds, correct?

3 A. I'm not sure if I used the term facilitate, but he was the
4 one who basically seemed to be directing the activities that
5 the funds related to and he was the one who was authorizing or
6 making the request for payments to the Kohn firm to basically
7 go ahead and, you know, pay an invoice or vendor or request for
8 money.

9 Q. All right. And if you look at paragraph 37, line 4, did
10 you indicate that Mr. Donziger maintained control over KSG's
11 investment through the facilitation, authorization of operation
12 expenses, etc.?

13 THE COURT: Mr. Friedman, if it's on the printed page,
14 he did. If it's not, he didn't.

15 Q. And by when there was a need, well, and the Kohn firm kept
16 track of those expenses, correct?

17 A. I saw schedules that indicated that it looks like they did
18 tracking.

19 Q. And when there was a need for a disbursement schedule, KSG
20 would provide that to Mr. Donziger?

21 MS. WINSTON: Objection, form.

22 THE COURT: Overruled.

23 A. I'm not sure what you mean by disbursement schedule.

24 Q. Looking at the bottom of page 19 of your report, the roles
25 of KSG and Donziger are clearly set forth in numerous documents

DANLCHE2

Dahlberg - cross

1 between Donziger and KSG, for example, whereby KSG provides
2 Donziger a detailed disbursement schedule so Donziger can
3 perform his function of overseeing the disbursements, etc.

4 A. Thank you for pointing that out. So in that situation,
5 yes.

6 Q. All right. And, in other words, it was KSG's responsible
7 to account for the expenses from 2003 to 2009?

8 A. That's not consistent with the documentation I saw as far
9 as responsibilities. In agreements and that kind of thing that
10 Mr. Donziger had executed or even his own statement of what his
11 role was or agreements he did with the Frente or the LAPs or
12 with investors, he had specific requirements under those
13 agreements, as I read them, to keep accurate books and records.

14 Q. And is it your view that he could not -- let's take the
15 Kohn firm, for example -- that he could not rely on the Kohn
16 firm's disbursement schedules to provide the entities you
17 talked about an accounting of what happened, where the money
18 went?

19 A. So, I saw no evidence to indicate that that responsibility
20 was actually given to the Kohn firm, whether it was I guess it
21 was the DeLeon investment documents or his agreements and
22 responsibilities with I think it was actually the plaintiffs
23 through Mr. Fajardo. He had personal responsibility as, I
24 guess, the U.S. representative -- I believe that was loosely
25 what his title was often -- to keep books, records

DANLCHE2

Dahlberg - cross

1 accountability. And I never saw any documentation anywhere
2 that that was understood to be assigned to another party.

3 Q. Well, let me ask you this: Are you here to give testimony
4 about what Mr. Donziger's legal responsibilities were to other
5 actors in the case?

6 A. No, I'm only testifying about the information I saw in the
7 documents I read.

8 Q. All right. And so let's go to this.

9 During the entire time you analyzed these financial
10 transactions, Mr. Donziger, did he have a separate office apart
11 from his kitchen in his apartment?

12 MS. WINSTON: Objection, form.

13 THE COURT: I'll allow it, if you know.

14 A. I do not.

15 Q. Did you see any office expenses in the documents that you
16 looked at?

17 A. I don't recall.

18 Q. Do you see any indication of, well, you don't recall.
19 Okay.

20 So, are you aware of any legal work he did other than
21 this case and one other matter for Mr. DeLeon during the time
22 period 2003 to 2012?

23 A. Those are the two that come to mind that I see in the
24 documents. So I don't think I understood that he was doing
25 anything else.

DANLCHE2

Dahlberg - cross

1 Q. Now, were you aware that the court allowed Mr. Donziger to
2 withhold some of his personal financial -- withhold or redact
3 certain personal financial information from production?

4 A. I was aware of that.

5 Q. If you would turn to page 12, footnote 15. One of the
6 indicia of -- potential indicia of fraud that you talk about in
7 your report is having excessive number of bank accounts; is
8 that correct?

9 A. That's correct.

10 Q. Is it your opinion that Mr. Donziger had an excessive
11 number of bank accounts?

12 A. Yes.

13 Q. If we look at footnote 15, this is where you list those
14 bank accounts?

15 A. Yes.

16 Q. When was the -- I want to go to No. 5 first, that's a
17 closed personal account; is that right?

18 A. It was eventually closed, yes.

19 Q. And when was it closed?

20 A. I don't recall.

21 Q. No. 6, when was that closed?

22 A. Again, I don't recall the exact time that it was closed.

23 Q. No. 7, closed personal account, when was that closed?

24 A. Same, I don't remember the date.

25 Q. Anything wrong or suspicious about somebody closing a

DANLCHE2

Dahlberg - cross

1 personal account?

2 A. No.

3 Q. He has a personal checking account that you list there.

4 Is there anything excessive or suspicious about having
5 a personal checking account?

6 A. Just by itself you're talking about?

7 Q. Well, right.

8 A. It's a hypothetical.

9 Q. You'll add them all together in the end, but I want to see
10 where the suspiciousness comes from.

11 Anything suspicious about having a personal checking
12 account?

13 A. Just having an account by itself, no, that would not be a
14 problem.

15 Q. Having it in conjunction with a personal savings account,
16 would that be suspicious?

17 A. Again, by itself, no.

18 Q. Was it appropriate in your view for him to have an Ecuador
19 case account?

20 A. That actually was a requirement for some of the funding
21 agreements.

22 Q. So that would be appropriate in your view?

23 A. Yes.

24 Q. Appropriate for him to have a separate law firm account?

25 A. Yes.

DANLCHE2

Dahlberg - cross

1 Q. Now, his agreement with DeLeon would have required or did
2 require a trust account, an IOLA account, correct?

3 A. That's correct.

4 Q. In fact, he was doing two different matters for Mr. DeLeon,
5 one involving this case and one involving something else?

6 A. There was some offshore party gambling matter, something, I
7 believe that's correct, yeah.

8 Q. So in your view, anything inappropriate about having two
9 IOLA accounts for his work with Mr. DeLeon?

10 A. No.

11 Q. He has a Chase investment account. Anything wrong with
12 having an investment account separate and apart from the other
13 accounts we just discussed?

14 A. No.

15 Q. And then there's an unidentified Chase account. Did you
16 identify how much money was in that account?

17 A. I don't think we ever got any records on that. I think we
18 just saw a reference to that account, so I don't think it was a
19 bank statement or anything.

20 Q. For all you know, this is a college fund for his son?

21 A. I don't know what it was.

22 Q. After the Kohn firm left the case and actually a little
23 before that, Mr. DeLeon began putting funding into the case; is
24 that correct?

25 A. That's what the documents that I reviewed indicate, yes.

DANLCHE2

Dahlberg - cross

1 Q. All right. In 2007, when the first money comes in from
2 Mr. DeLeon, you indicate that that was transferred to the Kohn
3 law firm, correct?

4 A. Eventually. It bounced through or went through one, maybe
5 two Donziger accounts, I can't remember, but before it was
6 moved to the Kohn firm.

7 Q. Let's look at your report. I'm on page 20, paragraph 39,
8 this says this reflects that the money came in from Mr. DeLeon
9 and was transferred to the Kohn firm?

10 A. I believe what it represents is that the money came from
11 DeLeon and was -- came into Mr. Donziger's law firm account, so
12 not the trust account that Mr. Donziger had. And then from his
13 law firm account, the money was then transferred to the Kohn
14 account.

15 Q. So it went to one Donziger account; is that correct?

16 A. His law firm account, that's correct.

17 Q. Now, his -- I think you may have already referred to
18 this -- his agreement with Mr. DeLeon required that he maintain
19 accurate and complete accounting and other financial records.
20 Is that what you told us?

21 A. That's what the document says.

22 Q. Did you see any evidence of complaints by Mr. DeLeon about
23 how the money was accounted for?

24 A. No.

25 Q. Now, the other category of funding that you talk about is

DANLCHE2

Dahlberg - cross

1 the Burford funding, correct?

2 A. I think there's some other -- categories, you're talking
3 about in the report.

4 Q. Yes.

5 A. Yes.

6 Q. And Burford put -- when Burford began funding the case, it
7 put its money into the -- its money wound up in the Patton
8 Boggs trust account; is that correct?

9 A. That's correct.

10 Q. Anything wrong with that in your view?

11 MS. WINSTON: Objection, vague.

12 THE COURT: Overruled.

13 A. So just to correct my statement, some of the money did end
14 up with Mr. Donziger. There was \$400,000 that was transferred
15 to him at some point. So it kind of went to the Patton Boggs
16 account first and then some of it migrated to Mr. Donziger.
17 But the 4 million it looks like went into the Patton Boggs.

18 Q. And do you have any opinion that it was inappropriate for
19 Patton Boggs to pay that money to Mr. Donziger?

20 A. The 400,000?

21 Q. Yeah.

22 A. I don't have an opinion as to whether it was inappropriate
23 for him to be paid that, no.

24 Q. You're not saying that there was anything wrong with the
25 way Patton Boggs accounted for the money to Burford, are you?

DANLCHE2

Dahlberg - cross

1 A. That's correct.

2 Q. Did you attempt to calculate how much of his own money
3 Mr. Donziger paid out to help fund this case?

4 THE COURT: If any.

5 A. At some point we might have looked at that. I don't know
6 that we were ever able to completely make it out.

7 It was kind of confusing to figure out where moneys
8 were coming and going and if it really looked like -- we never
9 saw anything that looked like an investment per se or loans per
10 se. So it was hard to say that, you know, moneys that were
11 kind of coming in to him weren't just flowing to pay, you know,
12 reimbursing for some expense to somebody else.

13 So there never looked like an official investment
14 document or official loan document where you would say that he
15 was actually formally putting in money like for capital.

16 Q. Right. And I was more getting at some of the issues you
17 talked about earlier. You talked about you didn't attempt to
18 capture say money he spent on hotel and travel over this period
19 of years?

20 A. For the final report, no, we didn't.

21 Q. In an earlier report did you?

22 A. Never in a report. But, you know, initially when we were
23 looking at things, we had a lot of data and there might have
24 been, you know, at some point in time we might have had some
25 idea of what his out-of-pockets were. But ultimately we

DANLCHE2

Dahlberg - cross

1 decided not to go with that.

2 Q. To go in that direction?

3 A. Yeah.

4 Q. All right.

5 MS. FRIEDMAN: Thank you. I don't have any other
6 questions.

7 THE COURT: Thank you. Mr. Gomez.

8 CROSS-EXAMINATION

9 BY MR. GOMEZ:

10 Q. Good morning, Mr. Dahlberg.

11 A. Good morning.

12 Q. Mr. Dahlberg, did you speak to anyone whose names appear on
13 the various records that you've reviewed like Joe Burlinger,
14 for example, or any of the people who work for the entities in
15 the various records you reviewed?

16 A. No.

17 Q. And is it fair to say that in the thousands of records that
18 you reviewed, you did not come across any documents showing any
19 transactions to or from Hugo Camacho, an Ecuadorian plaintiff
20 in the Lago Agrio case who is a defendant in this case?

21 MS. WINSTON: Objection, compound.

22 THE COURT: Sustained as to form.

23 Q. Is it fair to say that in all the documents you reviewed,
24 you did not see any transactions to and from a Hugo Camacho?

25 A. I have no recollection of seeing any documents.

DANLCHE2

Dahlberg - cross

1 Q. Is it fair to say you don't recall seeing any documents
2 showing any transactions to and from a Javier Piaguaje?

3 A. I have no recollection of seeing documents to him as well.

4 Q. Sir, do you have a recollection of seeing documents
5 indicating that any Ecuadorian plaintiff in the Lago Agrio case
6 had access to the various accounts that Mr. Donziger was
7 managing?

8 A. I don't recall seeing any records to indicate that they
9 did.

10 Q. Sir, isn't it true that after all the hours reviewing the
11 thousands of documents that you reviewed and the millions of
12 dollars in payment to your firm --

13 THE COURT: Sounds a little argumentative, sir. Do
14 you want to start again.

15 Q. Sir, isn't it true that you cannot confirm one way or the
16 other after all the work that you've done whether Mr. Donziger
17 intentionally tried to hide any of his transactions or was just
18 a really disorganized manager of his accounts?

19 A. I can confirm what my opinions are in my testimony which is
20 I guess somewhere in between what you just sort of laid out for
21 me as parameters to what I can confirm.

22 Q. Mr. Dahlberg, isn't it possible Mr. Donziger is just a
23 really disorganized manager of his accounts?

24 A. I would say, well, first of all, it's not more than
25 possible. It is a factual truth that he, based on the

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Dahlberg - cross

1 documents I saw, his records were completely disorganized and
2 were not well put together.

3 But I think my opinion as in my testimony is that that
4 is, in my experience, something that can be an indicator of
5 fraud, along with other things that I saw within the documents.

6 Q. But you didn't confirm a fraud; is that correct?

7 A. That is correct.

8 Q. And you didn't confirm any intention on Mr. Donziger to
9 actually hide his financial transactions from anyone, is that
10 correct, you didn't confirm that?

11 A. Well, when you say I didn't confirm it, okay, so there's
12 letters from Burford, a declaration from Bogart where they say
13 he committed fraud and that he did hide things. And there's a
14 letter from Mr. Kohn saying that he hid things from them and I
15 saw those documents. So, yes, I saw documentation to indicate
16 that at least people that were his investors believed he was
17 doing that.

18 Q. But that's all, you just saw documents that said those
19 things?

20 A. That's right. I saw documents that said that.

21 MR. GOMEZ: Thank you. Nothing further.

22 THE COURT: Any redirect, Ms. Winston?

23 MS. FRIEDMAN: I have some, your Honor, I'm not sure
24 what order you want to do that. This is an area where there's
25 a difference.

DANLCHE2

Dahlberg - cross

1 THE COURT: I thought you just cross-examined him for
2 a long period of time.

3 MS. FRIEDMAN: I did, but Mr. Gomez raised some issues
4 that I think I need to address.

5 THE COURT: Well, we'll hear from Ms. Winston first
6 and then we'll see where we go.

7 MS. WINSTON: Just a couple questions, your Honor.

8 REDIRECT EXAMINATION

9 BY MS. WINSTON:

10 Q. Mr. Dahlberg, do you recall being asked questions about
11 whether standing alone there was anything wrong with the
12 particular bank account held by Mr. Donziger?

13 THE COURT: Yes, he did. Let's go on.

14 Q. Mr. Dahlberg, you commented in your direct testimony that
15 Mr. Donziger held multiple accounts, correct?

16 A. That is correct.

17 Q. And is an excessive number of bank accounts a badge of
18 fraud in your view?

19 A. It is because of the way they related. So in my opinion
20 what I was saying was that because money moved in and out of
21 these accounts and that they didn't really stay for what their
22 designated purpose was, i.e., his personal accounts seemed to
23 handle money that was coming in from investors and the case
24 accounts seemed to sometimes handle personal money or money
25 that was coming in from his law firm, that it was the fact that

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Dahlberg - redirect

1 he had multiple accounts that weren't staying with transactions
2 or interactions that were the designated purpose. So that's
3 where he had multiple accounts with blurred distinctions about
4 how they were actually functioning and there was a commingling
5 of funds going on in these accounts.

6 MS. WINSTON: Thank you. That's all I have, your
7 Honor.

8 THE COURT: Thank you.

9 What is it, Mr. Friedman?

10 MS. FRIEDMAN: Your Honor, there are a couple points
11 Mr. Gomez brought up that I would like to address quickly.

12 THE COURT: Go ahead, briefly.

13 RECROSS EXAMINATION

14 BY MS. FRIEDMAN:

15 Q. Mr. Gomez asked you a question about -- I can't remember
16 the exact question, but in response you said that Burford and
17 Joe Kohn were complaining that Mr. Donziger had hidden
18 something from them, correct?

19 A. I think I said they used the term either material
20 misrepresentation or fraud. I think it was a declaration by
21 Mr. Bogart and one of the letters by Mr. Kohn.

22 Q. None of those had anything to do with financial or
23 accounting issues, did they?

24 A. No, that's not correct. In the course of my work when I'm
25 a forensic investigator, we actually interview people and we

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Dahlberg - recross

1 look at statements, you know, declarations, or if there were
2 live people I could have spoken with.

3 So actually when I see allegations by people, they
4 actually are fairly important to the way we investigate and
5 look at the overall documentation, the financial documentation
6 we look at as well.

7 Q. So I didn't see a reference to you interviewing people in
8 your report?

9 A. No, I didn't interview anyone.

10 Q. All right. So my question is the documents you were
11 referring to in response to Mr. Gomez's questions, those
12 complaints from those investors were not complaints about the
13 way Mr. Donziger managed money, correct?

14 A. They were about knowing the transparency of the activities,
15 and part of that is knowing the transparency of what the funds
16 were being used for.

17 Q. Can you show us a single document where either of those
18 entities, Burford or Joe Kohn's law office, complained about
19 the way Mr. Donziger financially accounted for expenditures?

20 MS. WINSTON: Objection.

21 THE WITNESS: I'm sorry.

22 THE COURT: What's the objection?

23 MS. WINSTON: Outside the scope, your Honor.

24 THE COURT: I'll allow it.

25 Q. Can you point us to a single document where they're

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Dahlberg - recross

1 complaining about the way he accounted for money?

2 A. So maybe this is a definitional thing, but they account
3 for, they complain about moneys that they were expending and
4 that they didn't know what the true nature was for what they
5 were spending it for.

6 So that would be part of the accounting is
7 understanding when someone makes a request, like when
8 Mr. Donziger made a request of I guess it was Karen Wilson at
9 the Kohn firm to send money to the Frente relating to
10 Mr. Cabrera, she questioned why it was being done and he didn't
11 tell her why it was really being done.

12 So normally in accounting records, you expect when you
13 get a request for a payment that you're actually going to get
14 information that really relates to what the real purpose of a
15 payment was for.

16 Q. Let's go back, Mr. Dahlberg. The fact that he requested
17 money for a certain service and somebody questioned the need
18 for that service is different than saying he's keeping bad
19 records, isn't it?

20 A. No. They didn't argue, they didn't even talk about the
21 need for the service. He didn't tell them what it was for,
22 which goes right back to what Mr. Kohn's letter was about.

23 Q. Why don't you direct us to the document, if you would.

24 A. Let's see here. I'll try. I believe if you go to my --
25 let's see. The attachment is probably the easiest way to get

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Dahlberg - recross

1 to it because it's in here twice. Attachment L, which is
2 Plaintiff's Exhibit 2139.

3 Q. I'm sorry, what page is that?

4 A. It's page 136. So if you look at the --

5 Q. I'm sorry, let me catch up. I'm not finding page 136. Are
6 you talking about your report?

7 A. It's easiest to find it through the attachment. So it's
8 attachment L, but that's actually got a page number to it too.

9 Q. So let me catch up with you here for a minute.

10 Attachment L.

11 A. All right. So it's a chart and it says payments to Richard
12 Cabrera and it's Plaintiff's Exhibit 2139.

13 Q. Yes.

14 A. Okay. So at the bottom part of this chart, it explains the
15 payments that were made to Cabrera out of the Frente account
16 for, well, there was a \$33,000 payment and then there may have
17 been other payments up to 120,000.

18 Actually there's a sequence down of the actual emails
19 that are in a chain where Mr. Yanza starts talking to
20 Mr. Donziger about the need to pay the Wuao for activities that
21 were being done I guess related to his expert witness report in
22 Ecuador.

23 And so he gets from Mr. Yanza the specific request as
24 to what he needs the money for. Then he makes a money request
25 for this critical money transfer which sort of flows out of 07

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Dahlberg - recross

1 towards the bottom of the chart there. I think it's PX897 if
2 you wanted to go look at the emails.

3 And in that he doesn't explain why he wants the Kohn
4 firm to send the \$50,000 to the Frente account, the secret
5 account. He actually doesn't explain any of that at all. He
6 doesn't call it the secret account. He doesn't explain what
7 the basis was. He just tells the Kohn firm to direct it.

8 And I believe Karen Wilson, who initially is working
9 with Mr. Kohn to kind of keep track of the thing, kind of
10 questions why he's doing it and he basically says just do it.

11 Q. And do they?

12 A. They do transfer it ultimately. And but that's the kind of
13 thing where later on Mr. Kohn directly comes back in his letter
14 where he appears to be ending his relationship with, you know,
15 his representation and he references back to not knowing what
16 these funds were for, not knowing what was going on, and that
17 he holds that as a serious misrepresentation it sounds like
18 when reading the letter.

19 Q. So I want to be clear. What you're saying is the letter of
20 termination of the relationship that Mr. Kohn sent to
21 Mr. Donziger, is the letter one of the facts I guess that
22 you're pointing to a document in which Mr. Kohn is complaining
23 about the way money is accounted for?

24 A. He's complaining about the fact he doesn't know, right,
25 what the purpose of the funds were and that had he known, he

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Dahlberg - recross

1 would have I guess based on the letter done something
2 differently.

3 Q. All right.

4 MS. FRIEDMAN: Thank you.

5 THE COURT: Anything? Thank you.

6 Ms. Winston, anything else?

7 MS. WINSTON: No thank you, your Honor.

8 THE COURT: All right. We'll take our morning break
9 right here.

10 (Witness excused)

11 (Recess)

12 THE COURT: Okay. Next witness, please.

13 MS. NEUMAN: Your Honor, Chevron calls James Spigelman
14 to the stand.

15 MR. BOOTH: Your Honor, I have an objection to make
16 before this witness testifies.

17 Your Honor, I'm moving to strike the witness statement
18 of this witness in its entirety for two reasons. First of all,
19 it is -- this is a witness who is or has read documents which
20 are in evidence, documents which speak for themselves. He is
21 interpreting the words of those documents and he is rendering
22 opinions on foreign law, all of those things as I understand to
23 be things that -- especially from watching yesterday -- that
24 this is not proper subject of testimony.

25 And so we would move to strike this witness and this

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witness statement in its entirety. His statement does not
contain anything other than those things.

(Continued on next page)

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1 THE COURT: Ms. Neuman.

2 MS. NEUMAN: Thank you, your Honor.

3 THE COURT: You have had this statement for how long,
4 Mr. Booth?

5 MR. BOOTH: Me, personally, I got it last night. We
6 have had it longer.

7 THE COURT: Let's talk about it collectively, please.
8 You have had it for a couple of weeks, right?

9 MS. NEUMAN: We served the report in February. This
10 was a served expert report. The statement matches the report
11 exactly.

12 THE COURT: Go ahead.

13 MS. NEUMAN: Your Honor, I think counsel is confusing
14 the issues of foreign law the Court needs to address with the
15 substantive decision it's going to make in this case, and these
16 issues of foreign law which are mixed with the evidence of
17 fraud.

18 According to Mr. Spigelman's direct testimony, there
19 is an incorrect statement of Australian law that appears both
20 in the Moodie memo, Plaintiff's Exhibit 1101, and the
21 Ecuadorian judgment. The misstatements in the words used to
22 make the misstatements are identical. So it is not opinion of
23 foreign law which your Honor has to reach to make a finding of
24 liability or otherwise. It's an opinion that the statement of
25 foreign law in the judgment and in a plaintiff's document are

DAN8CHE3

1 identical and incorrect.

2 Mr. Spigelman's report is a subreport to Professor
3 Green, who offers an opinion that the discussion of causation
4 in the judgment was derived also from the Moodie memo. And he
5 relies on Mr. Spigelman's opinion to reach that ultimate
6 conclusion as it relates to issues of Australian law.

7 THE COURT: Anything else to say on this, Mr. Booth?

8 MR. BOOTH: Yes, your Honor.

9 The critical issue here is this is a witness that
10 appears to be, they testified that the coincidence that two
11 documents could have the same language is too great, given the
12 concept of the language is wrong under the law that it purports
13 to cite. If the language is not wrong, if this is an
14 appropriate statement of Australian law, then the coincidence
15 is not quite as big, because obviously it could have been found
16 as a correct statement of Australian law.

17 THE COURT: That was in the extensive Australian law
18 libraries of Quito?

19 MR. BOOTH: Yes. So my point is there will be
20 discussion about this being incorrect, which is a issue of
21 foreign law. And I believe that the Court has dealt with that
22 in a certain way.

23 THE COURT: I think it's probably distinguishable. I
24 will take it subject to your objection, and I will see what I
25 make of it, and I will hear the witness.

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1 MS. NEUMAN: Thank you, your Honor.

2 JAMES SPIGELMAN,

3 called as a witness by the plaintiff,

4 having been duly sworn, testified as follows:

5 THE DEPUTY CLERK: State your name and spell your last
6 name for the record.

7 THE WITNESS: James Spigelman, S-P-I-G-E-L-M-A-N.

8 THE COURT: You may proceed, counsel.

9 DIRECT EXAMINATION

10 BY MS. NEUMAN:

11 Q. Good morning, Mr. Spigelman.

12 A. Good morning.

13 Q. Did you prepare your direct testimony in a written form?

14 A. I did.

15 MS. NEUMAN: May I approach the witness?

16 THE COURT: You may.

17 Q. Mr. Spigelman, do you have Exhibit 5000 in front of you?

18 A. I do.

19 Q. Is this a true and correct copy of your direct testimony in
20 this matter?

21 A. It is. I have signed it and initialed each page.

22 Q. You see the initials and signatures that you put on the
23 copy in front of you?

24 A. Yes.

25 MS. NEUMAN: Plaintiffs would move the admission of

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Spigelman - direct

1 Plaintiff's Exhibit 5000 and Plaintiff's Exhibit 1101, the
2 Moodie memo which is referenced in Exhibit 5000.

3 THE COURT: You're offering the Moodie memo for the
4 truth or are you offering it on some other basis?

5 MS. NEUMAN: Not for the truth.

6 THE COURT: Any objection beyond what I have heard
7 already?

8 MR. BOOTH: No, your Honor.

9 THE COURT: 5000 is received on the basis that I
10 indicated previously.

11 Plaintiff's 1101 is received, but not for the truth of
12 the matters stated.

13 (Plaintiff's Exhibits 5000 and 1101 received in
14 evidence)

15 MS. NEUMAN: Plaintiffs pass the witness.

16 THE COURT: Cross-examination, Mr. Booth.

17 MR. BOOTH: May I, your Honor?

18 THE COURT: Sure.

19 CROSS-EXAMINATION

20 BY MR. BOOTH:

21 Q. Good morning, sir. My name is Rainey Booth. I want to
22 begin with, do you have your witness statement in front of you?

23 A. I do.

24 Q. In the book that I just handed you, your witness statement
25 should be tab 1?

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Spigelman - cross

1 A. Yes.

2 Q. First, can you tell the Court what material specifically
3 you reviewed in forming your opinion in this case?

4 A. I had undertaken a search of certain words on electronic
5 databases, two relevant databases, and I didn't really review
6 any materials, in the sense that I drew on my own memory and
7 knowledge of Australian tort law. The only case I read at the
8 time that I prepared my original report was my own judgment in
9 a case called *Seltsam* that is referred to in the Moodie memo as
10 an authority. I did refer to that case at the time of
11 preparing.

12 THE COURT: Just for the sake of clarity, sir, and
13 bearing in mind the notion that the UK and the United States
14 are two nations separated by a common language, I take it that
15 in your parlance, a judgment is what we would call, we American
16 lawyers and judges, an opinion or a decision, is that correct?

17 THE WITNESS: That's correct.

18 THE COURT: Let's proceed.

19 Q. And *Seltsam* is S-E-L-T-S-A-M, is that right?

20 A. Yes.

21 In addition to that, I read a High Court judgment,
22 which was after *Seltsam* but in the same territory, called *Amaca*
23 *v. Ellis*. I did read that at the time as well.

24 Q. Would you describe the search of the databases? Was that
25 something you directed others to do on your behalf?

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Spigelman - cross

1 A. Yes. I have a research assistant who does work for me.

2 Q. If you look at your witness statement, those databases, can
3 you tell us, are those Australian databases?

4 A. Yes.

5 Q. Those would be in English?

6 A. They are in English, yes.

7 Q. Those would be Australian law databases?

8 A. They are.

9 Q. Did you direct any searches in any other database other
10 than Australian law databases?

11 A. No.

12 Q. Did you direct any searches in any Spanish language
13 databases?

14 A. No.

15 Q. Did you have anyone direct any database searches in
16 Spanish?

17 A. No.

18 Q. Did you attempt to make any determination of what resources
19 would have been available in Ecuador to conduct searches of
20 Australian law prior to February 14, 2011?

21 A. No.

22 Q. Did you read the Ecuadorian judgment of February 14, 2011?

23 A. I tried. I found it a difficult process. My attention had
24 been directed to certain pages, and I read those carefully, and
25 I sought to put them in their context, but I found it a

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Spigelman - cross

1 difficult process. I could say I skimmed the judgment, but I
2 did not read it in whole. I read certain pages.

3 Q. Did you read the judgment in English or in Spanish?

4 A. Only in English. I have no Spanish.

5 Q. You do not speak Spanish?

6 A. No.

7 Q. In terms of the actual pages that you sat down and actually
8 read as opposed to skimmed, do you have any idea what those
9 pages were?

10 I can direct you to tab 7 of the book I handed you.
11 Is the judgment --

12 A. 80 something would have been the first -- I can't remember.
13 It was in the 80s I thought.

14 Q. I think that the part of the judgment that you quote in
15 your witness statement is on page 90.

16 A. Yes. But I read from before that.

17 At the foot of page 86, there is a heading called
18 causation -- not a heading. The second to last line is
19 causation. I read from there onwards, to I think page 90.
20 Then there was another passage a few pages later.

21 I'm sorry. I can't pick it up. It was a shorter
22 passage of two or three pages as I remember.

23 Q. My question to you, let me ask it this way. You did read
24 the Ecuadorian judgment in terms of the sections that you found
25 pertaining to causation, is that fair?

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Spigelman - cross

1 A. Yes, only causation.

2 Q. Now, in your report you make reference at paragraph 13 -- I
3 should say your witness statement, you make reference at
4 paragraph 13, I believe that's on page 4, to a phrase "minimum,
5 trivial or an insignificant factor." Do you see that?

6 A. Yes.

7 Q. In the searches that you had performed for you, I think you
8 describe in your report how those searches were conducted in
9 the Australian legal databases, is that right?

10 A. That's right.

11 Q. In terms of those words, do you know whether any search was
12 done of those words in Spanish in any database?

13 A. No, it was not. Sorry. It was not by me or at my
14 direction.

15 Q. I believe that you mention or you indicate in paragraph 13
16 that you are aware of a published article in the Medical
17 Journal of Australia in 2002 that has or contains that phrase
18 "minimum, trivial or an insignificant factor"?

19 A. It was a footnote in the Moodie memorandum.

20 Q. If you turn to tab 2 of the book I gave you, would you
21 confirm that that document, which is Defendants' Exhibit DX
22 1201, is in fact that medical --

23 A. Yes, it is.

24 Q. -- article from Australia?

25 A. Yes.

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Spigelman - cross

1 Q. Were you satisfied that this medical article from Australia
2 named "Sharp v. Port Kembla RSL Club: Establishing causation
3 of laryngeal cancer by environmental tobacco smoke" was
4 available publicly prior to February 14, 2011?

5 A. I am sure it was.

6 Q. Did you take any steps to see if this article, or materials
7 discussed in the article, was available prior to February 14,
8 2011 in Spanish?

9 A. I am quite sure the Medical Journal of Australia isn't
10 published in Spanish, but whether someone translated it, I
11 would not know.

12 Q. If you look back to your witness statement, paragraph 14 I
13 believe, I believe you discuss in the context of Australian
14 law, there are cases in which the terms "de minimis" or
15 "negligible" contribution have been used to describe a
16 causation analysis, is that true?

17 A. That's true.

18 Q. I meant to ask you earlier, were the only two cases you
19 reviewed specifically for doing this witness statement was your
20 opinion in the *Seltsam* and the *Amaca v. Ellis* case, is that
21 right?

22 A. Reviewed, yes, but I have a great deal of familiarity with
23 this area of the law that I didn't need to look up cases or
24 even texts. But those were the specific cases that I checked.
25 The main reason I looked at *Ellis* is because it came out after

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Spigelman - cross

1 I stopped reading things like this profession; it was a new
2 judgment for me.

3 Q. Did you read the case *Amaca v. Booth*?

4 A. Yes. I have read that at some stage, but not in this
5 context.

6 Q. Here on paragraph 14 of your report, you talk about the
7 circumstances when de minimis or negligible contribution, when
8 that type of causation analysis is appropriate under Australian
9 law?

10 A. Yes.

11 Q. What you have written here, I won't reread it, but would
12 you agree that those cases, where that standard is applicable,
13 would be cases like an asbestosis exposure over many years?

14 MS. NEUMAN: Objection. Vague.

15 THE COURT: Overruled.

16 Q. Is that right?

17 THE WITNESS: I'm sorry?

18 THE COURT: Overruled means you go ahead and answer
19 it.

20 THE WITNESS: Thank you. Sorry.

21 A. No, I don't think so, although there are some theories of
22 mesothelioma in which it could apply. The case in question was
23 a silica case, where that formulation was used, as explained by
24 the High Court in *Amaca v. Ellis*. It was a form of, where the
25 actual medical causation was cumulative, in the sense that each

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Spigelman - cross

1 exposure made a contribution to the disease.

2 Now, there are some aspects of the asbestosis case
3 law, with which I am not completely familiar, but it would be
4 consistent with a single fiber theory of mesothelioma, but it
5 would apply, I understood, to other kinds of exposure.

6 Q. Primarily, if I understand what you said, to exposures that
7 would be cumulative over a period of time as opposed to a
8 one-time shot, right?

9 A. Yes. Either a one-time shot or a context in which you're
10 attributing responsibility for multiple exposures of the same
11 kind.

12 Q. That would be the circumstances, the cumulative exposure,
13 when the terms de minimis or negligible contribution causation
14 analysis would be appropriate under Australian law?

15 A. No. Well, similar terminology, de minimis or minimal.
16 That's an old English case from the 1940s where that
17 terminology first emerged, and in Australian law, it's been
18 clearly confined to that kind of context. And asbestos raises
19 different issues, and different cases in that field involve
20 different kinds of evidence. It's a bit hard to generalize, I
21 think, in the mesothelioma territory.

22 Q. Let me ask you to turn to paragraph 16, page 5, your second
23 opinion.

24 A. I'm sorry, 16?

25 Q. Paragraph 16, which is on page 5.

DAN8CHE3

Spigelman - cross

1 A. I'm sorry. Yes.

2 Q. Now, I am not sure I understand the opinion here so I need
3 clarification of what you're saying.

4 Are you saying that the use of the phrase "strands in
5 a cable" that you used in your opinion in *Seltsam*, that you
6 interpret that phrase to be related somehow to the portions of
7 the Ecuadorian judgment in the Moodie memo that you quote?

8 A. Yes. In fact, the Moodie memo references my judgment at
9 the very paragraphs in which I adopt that terminology. It's
10 not my terminology.

11 Q. If we focus on the Ecuadorian judgment, the portion of it
12 that you quote here on page 5, and then on page 6, nowhere in
13 that portion does it use the phrase "strands in a cable,"
14 correct?

15 A. Yes.

16 Q. It's your interpretation of what the Ecuadorian judgment is
17 saying that you say that relates to the terminology or the term
18 "strands in a cable," correct?

19 A. Well, I think it's similar. But, yes, that was my
20 interpretation. I think strands in a cable is a very
21 well-known formulation for that kind of inference.

22 Q. But if your interpretation is correct, your criticism here
23 is that the author of the Ecuadorian judgment attributes that
24 concept to Australian case law as opposed to a more global
25 understanding of case law, is that fair?

DAN8CHE3

Spigelman - cross

1 A. I wouldn't call it criticism. It's just something that I
2 found odd that a proposition of that general character would be
3 attributed to Australian case law. It was an oddity rather
4 than -- I don't disagree with it. I think it's correct. But
5 it's just an oddity for it to be described in that manner in
6 both documents.

7 Q. Well, let me ask you, in the parts of the judgment, the
8 Ecuadorian judgment of 2/14/11 that you read, did you see that
9 the author spoke about the law from other countries as well?

10 A. Yes.

11 Q. Colombia, for example?

12 A. I did see that, yes.

13 Q. France, for example?

14 A. Yes.

15 Q. The United States?

16 A. Yes.

17 Q. The UK?

18 A. Yes.

19 Q. As well as Australia?

20 A. Yes.

21 Q. Could you see that the author of the Ecuadorian judgment
22 was discussing causation concepts from different countries in
23 that portion that you read?

24 A. Yes.

25 MS. NEUMAN: Objection. Form. It assumes facts not

DAN8CHE3

Spigelman - cross

1 in evidence.

2 THE COURT: I will allow the answer to stand.

3 Q. I think you just indicated, but let me be sure. The
4 statement that you quote on page 5, Australian case law tells
5 us, strands in the cable is a phrase used in Australian case
6 law, correct?

7 A. Well, it's Wigmore's terminology. It's from an American
8 text. We stole it.

9 Q. But after you stole it, it was an Australian case law?

10 A. It's used often.

11 Q. If you will turn to tab 3 of the binder I gave you.

12 First of all, do you recognize this document, is this
13 something that you have seen? It's Defendants' DX 1203?

14 A. No.

15 Q. Do you see the first page where it indicates copyright
16 2007, the very first page?

17 THE COURT: Let's hope this is not an eye examination.

18 MR. BOOTH: Sorry, your Honor. I apologize.

19 Q. Can you turn to the tab in the paper? That should be page
20 15. Let me ask you -- is the portion highlighted?

21 A. Yes.

22 Q. You see where it indicates, it's talking about in
23 Australia, and it discusses the *Seltsam* case. Do you see that?

24 A. Yes.

25 Q. You see going down to the second area of highlight, it

DAN8CHE3

Spigelman - cross

1 talks about Spigelman, "paragraph 137 speaks of sources of
2 evidence in tortious claims as strands in the cable." Do you
3 see that?

4 A. Yes.

5 Q. Do you not see anywhere that it cites to Wigmore or any
6 other source other than your case, right?

7 A. Yes. I see that.

8 THE COURT: It also says tortuous, not tortious.

9 Q. So it would not surprise you then, would it, to find your
10 case cited throughout various different domestic and
11 international law journals discussing this "strands in a cable"
12 analogy, would it?

13 A. I am flattered by that, yes, thank you.

14 Q. The analogy you use in your case, "strands in a cable" type
15 assessment, from your view of Australian law, is that still an
16 accurate statement in Australian law, is that still an accurate
17 way to view causation under Australian law?

18 A. It is a process of finding facts of any character,
19 causation or other facts.

20 Q. As you indicated, that is a concept that you have found
21 present in international law looking at the issue of causation
22 as well?

23 A. Yes.

24 Q. Mr. Spigelman, would you also look at tab 4 of the binder?

25 A. Yes.

DAN8CHE3

Spigelman - cross

1 Q. Do you recognize Defense Exhibit 1204 as being a copy of
2 the *Fairchild* case from the UK?

3 A. Yes.

4 Q. Are you familiar with that case?

5 A. I actually never read it, but I am familiar with what its
6 basic propositions are.

7 Q. The *Fairchild* case is a case that is cited in Australian
8 cases, correct?

9 A. Incorrect. It's cited, but with a view of disapproval.

10 Q. Can you turn to tab 5 of the binder?

11 A. Yes.

12 Q. Now, this is not a case. I will represent that to you.
13 It's Defendants' DX 1205. I will ask you to forgive me. I
14 could not get on an Australian legal Web site last night to
15 print the actual case. Do you recognize this as an article
16 referencing the *Amaca v. Booth* case?

17 A. Yes.

18 Q. Do you see the highlighted portion where it indicates in
19 Australia the House of Lords endorsed that material increase to
20 risk causation --

21 A. We don't have a House of Lords.

22 Q. I misread.

23 Are you aware of whether the *Amaca v. Booth* case has
24 approached the *Fairchild* approach to material increase to risk
25 that was adopted by the House of Lords in the *Fairchild* case?

DAN8CHE3

Spigelman - cross

1 A. My understanding in *Amaca v. Booth*, the Australian High
2 Court refused to follow it. I have answered your question.

3 Q. Can you turn to tab 6 of the binder that I gave you and
4 confirm that Defendants' Exhibit 1202 is a copy of the opinion
5 that you wrote in the *Seltsam* case?

6 A. Yes, it appears to be.

7 MR. BOOTH: At this time, we would move into evidence
8 the Defendants' Exhibit DX 1201, which is at tab 2.

9 MS. NEUMAN: No objection.

10 THE COURT: Simply for the fact that they say what
11 they say, is that right?

12 MR. BOOTH: Yes, your Honor.

13 THE COURT: Received on that basis.

14 (Defendants' Exhibit 1201 received in evidence)

15 MR. BOOTH: On the same basis, Defendants' Exhibit
16 1203.

17 THE COURT: Same ruling.

18 (Defendants' Exhibit 1203 received in evidence)

19 MR. BOOTH: Again, your Honor, to the extent that this
20 deals with not what actually is Australian law, but testimony
21 about what would have been available, we would move it in for
22 that purpose.

23 Tab 4, which is DX 1204, the *Fairchild* case, we move
24 that in evidence.

25 THE COURT: Received not for the truth.

DAN8CHE3

Spigelman - cross

1 (Defendants' Exhibit 1204 received in evidence)

2 MR. BOOTH: Defendants' Exhibit DX 1205.

3 THE COURT: And 1202, I take it, right?

4 MR. BOOTH: Yes.

5 THE COURT: All received on that basis.

6 (Defendants' Exhibits 1202 and 1204 received in
7 evidence)

8 MR. BOOTH: Those are my questions.

9 THE COURT: Mr. Gomez.

10 CROSS-EXAMINATION

11 BY MR. GOMEZ:

12 Q. Good morning, Mr. Spigelman.

13 A. Good morning.

14 Q. Mr. Spigelman, what is the total amount that you have been
15 paid for your work on this matter?

16 A. I don't know. Up to today, I'm not sure. 10, 20, maybe
17 20, 30.

18 Q. Are you being paid on a flat rate or an hourly rate?

19 A. An hourly rate.

20 Q. What is your hourly rate?

21 A. A thousand dollars Australian an hour.

22 Q. How many trips have you made to the United States for
23 purposes of this work?

24 A. This is my second.

25 Q. Have you been paid for your time to travel on those trips

DAN8CHE3

Spigelman - cross

1 at the thousand dollar an hour rate?

2 A. Yes.

3 Q. How long is the flight from New York to Australia, sir?

4 A. Hopefully, about 22 hours.

5 Q. You always fly first class?

6 A. I did the first occasion. I did not on this occasion.

7 Q. Are you an expert on plagiarism?

8 A. No.

9 Q. You have no training, sir, to assess how much similarity
10 between texts would constitute plagiarism?

11 A. Not particularly.

12 MS. NEUMAN: Objection. Beyond the scope.

13 THE COURT: Sustained.

14 Q. Sir, during your analysis and during the work and the
15 searches that you did, were you able to rule out the existence
16 of a common antecedent document that may have been used by the
17 authors of the judgment and the Moodie memo to make the
18 statements that are the focus of your analysis?

19 MS. NEUMAN: Objection. Beyond the scope.

20 THE COURT: Overruled.

21 I couldn't hear the answer.

22 A. No. I made no such analysis.

23 MR. GOMEZ: Thank you.

24 THE COURT: Thank you.

25 Anything else, Ms. Neuman?

DAN8CHE3

Spigelman - cross

1 MS. NEUMAN: No redirect.

2 THE COURT: Thank you, Mr. Spigelman. You're excused.

3 (Witness excused)

4 THE COURT: Next witness, please.

5 MR. MASTRO: Your Honor, Chevron calls Alberto Guerra.

6 ALBERTO GUERRA,

7 called as a witness by the plaintiff,

8 having been duly sworn, through official Spanish

9 interpreter, testified as follows:

10 THE DEPUTY CLERK: State your name for the record.

11 THE WITNESS: I respond to the names of Alberto Guerra
12 Bastidas.

13 MR. MASTRO: May I approach the witness?

14 THE COURT: You may.

15 DIRECT EXAMINATION

16 BY MR. MASTRO:

17 Q. Mr. Guerra, I am handing you a copy of your declaration.
18 Do you see that, sir?

19 A. Yes, I see it.

20 Q. Would you please turn to the last page? Is that your
21 signature on the last page of the document, sir?

22 A. Yes, it is.

23 Q. Sir, we have over the last 24 hours made a number of
24 changes in your declaration to remove certain language. You
25 have initialed those, correct, sir?

DAN8CHE3

Guerra - direct

1 A. Yes.

2 Q. I refer you specifically to paragraphs 4, 7, 10, 11, 21,
3 22, 50, and 63.

4 A. Yes.

5 Q. Are those the paragraphs where you removed certain of your
6 declaration language and initialed them in the margin?

7 A. Correct.

8 Q. Sir, was this declaration as redacted true and correct at
9 the time you signed it?

10 A. Yes, sir.

11 Q. Is it true and correct today?

12 A. Yes.

13 MR. MASTRO: Your Honor, I am going to do a
14 supplemental examination, as agreed, on subjects of
15 Mr. Guerra's work on the Chevron case and as a ghost writer for
16 Judge Zambrano, and then issues relating to the issues of the
17 judgment in the Chevron case.

18 I offer at this time the declaration as his direct
19 testimony to be supplemented by those examinations.

20 THE COURT: Received on the same basis of the others.

21 (Plaintiff's Exhibit 4800 received in evidence)

22 MR. MASTRO: I also hand up to the Court 4800A, which
23 is a list of the exhibits that Mr. Guerra entered in his
24 deposition.

25 MS. LITTLEPAGE: We have some objections to the

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Guerra - direct

1 exhibits. I thought that perhaps Mr. Mastro would lay a
2 stronger foundation for some of the exhibits. Do you want me
3 to make my objections now? There are some records that do not
4 have a custodial records affidavit. There is no authenticity,
5 and we object to them.

6 THE COURT: First of all, I am going to take them all
7 on the same basis that we have taken all of the others. But
8 you are to inform Mr. Mastro when we break for lunch of any
9 exhibits as to which you have any objection that could be cured
10 through the examination with the witness, even arguably. So
11 that he can lay whatever foundation he is able and needs to lay
12 in his judgment.

13 MS. LITTLEPAGE: Yes.

14 (Plaintiff's Exhibit 4800A received in evidence)

15 MR. MASTRO: If I may also approach the witness before
16 I begin my examination.

17 THE COURT: Yes.

18 MR. MASTRO: I wanted to hand him two originals of PX
19 1733 and PX 1734 in case he needs to refer to them.

20 BY MR. MASTRO:

21 Q. Am I correct, sir, that those are day planners or diaries
22 that you kept?

23 A. Yes, they are.

24 Q. Mr. Guerra, directing your attention to the period after
25 you stopped being a judge, after 2008, what, if any,

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Guerra - direct

1 involvement did you have in the Chevron case?

2 A. Through an agreement with Mr. Zambrano, after 2008, after
3 being a judge, I became his ghost writer regarding all the
4 court orders involving all the trials that were assigned to him
5 by draw, by lottery. And I was likewise the ghost writer
6 regarding the court orders that he had to issue regarding the
7 Chevron case, during the periods of time when he was in charge
8 of writing those orders, because he was hearing the case.

9 Finally, because of the circumstance, I undertook a
10 review, revision of the judgment, which according to him, as he
11 stated to me and he assured me, had been provided to him by the
12 plaintiffs in the Chevron case.

13 Q. I am going to ask you more questions about that over the
14 course of this examination, Mr. Guerra.

15 You just made reference to ghostwriting orders for
16 Judge Zambrano. In what types of cases did you ghostwrite
17 orders for Judge Zambrano?

18 A. I wrote for Judge Zambrano the rulings and the judgment
19 that was to be issued in those matters, civil matters, that
20 were assigned to Mr. Zambrano by lottery.

21 Q. Mr. Guerra, I refer you to PX 129. It will come up on the
22 screen.

23 Can you identify for us who this is a photograph of?

24 A. Yes. This is Judge Nicolas Augusto Zambrano Lozada.

25 Q. When was the first time that Mr. Zambrano began presiding

DAN8CHE3

Guerra - direct

1 over the Chevron case?

2 A. He heard the case, he began hearing the case in October of
3 2009.

4 Q. What happened, if anything, in October 2009 that led Mr.
5 Zambrano to be the judge presiding over the Chevron case?

6 A. The president of the court, who was also the sitting judge
7 hearing the Chevron case at the time, recused himself from the
8 case. And under these circumstances, Mr. Zambrano, Judge
9 Zambrano, took over the Chevron case because he was the
10 subrogating judge of the court.

11 Q. Mr. Guerra, how long --

12 THE COURT: I'm sorry. I missed a word. He was a
13 what judge?

14 THE INTERPRETER: Subrogating judge of the court.

15 Q. Mr. Guerra, once Mr. Zambrano took over presiding over the
16 Chevron case in October 2009, how long did he preside over the
17 case in his first tenure?

18 A. He heard the case during that first stage until February of
19 2010.

20 Q. Am I correct that the judge he succeeded was Judge Nunez?

21 A. Judge Zambrano replaced Judge Nunez.

22 Q. Who presided over the Chevron case after February 2010,
23 which judge?

24 A. It was heard by Judge Leonardo Ordonez Pina.

25 Q. Did there come a time after February 2010 that Judge

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Guerra - direct

1 Zambrano resumed presiding over the Chevron case?

2 A. Yes.

3 Q. What happened, if anything, that led to Mr. Zambrano
4 presiding over the Chevron case again?

5 A. Judge Ordonez Pina was recused by Chevron and therefore he
6 had to recuse himself from the case.

7 Q. Sir, during which period of time did you ghostwrite orders
8 for Judge Zambrano in the Chevron case, his first tenure, his
9 second tenure or both?

10 A. In both terms of Mr. Zambrano's.

11 Q. In drafting Judge Zambrano's orders in the Chevron case,
12 did you understand that you were violating Ecuadorian law?

13 A. Yes.

14 Q. Let me return to Judge Zambrano's first tenure on the
15 Chevron case, October 2009 to February 2010.

16 During that period of time, when you were ghostwriting
17 for Judge Zambrano, what, if anything, did you receive from
18 Judge Zambrano in exchange for ghostwriting his orders in civil
19 cases?

20 A. He and I agreed that regarding the issue of my writing for
21 him the court orders in his civil cases, I would receive from
22 him a thousand dollars a month.

23 Q. Did Judge Zambrano pay you out of his own pocket from his
24 own funds that thousand dollars a month?

25 A. He paid it to me. I understood he was getting it from his

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Guerra - direct

1 own funds, from his own pocket.

2 Q. Sir, in receiving a thousand dollars a month from Judge
3 Zambrano to ghostwrite his orders in civil cases, did you
4 understand you were violating Ecuadorian law?

5 A. Yes, of course, yes.

6 Q. Did there come a time when you and Judge Zambrano discussed
7 during his first tenure of the Chevron case soliciting a bribe
8 from Chevron?

9 A. Yes.

10 Q. What, if anything, did Judge Zambrano say to you about
11 soliciting such a bribe?

12 A. Mr. Zambrano instructed me, because I was somebody whom he
13 trusted, that I should use my friendships, my acquaintances, to
14 make contact with attorneys from Chevron, the attorneys
15 defending Chevron, in order for me to talk to them for the
16 purpose of to make contact with them to talk about, to agree
17 regarding certain important issues of the case, which finally,
18 obviously, included the possibility of drafting the judgment.

19 Q. Sir, just to be clear on the time frame, the conversation
20 you just testified about with Judge Zambrano, that would have
21 been late summer, early fall of 2009?

22 A. In Ecuador, we don't have the seasons very clearly defined,
23 but this event took place, approximately, between August and
24 September of 2009.

25 Q. By that time, did Judge Zambrano anticipate becoming the

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Guerra - direct

1 judge on the Chevron case because of the Nunez recusal?

2 A. Correct, sir, yes.

3 Q. What did Judge Zambrano tell you, if any, in the
4 conversation you just described about why he wanted you to
5 contact Chevron in the first instance instead of the Ecuadorian
6 plaintiffs' lawyers?

7 MS. LITTLEPAGE: Objection. Hearsay.

8 THE COURT: Overruled. Subject to the point that was
9 made in the robing room conference this morning, I am taking it
10 subject to connection.

11 MS. LITTLEPAGE: Can I just have a running objection?

12 THE COURT: Let's start out making it for each, and if
13 it becomes a burden, we will see where we are.

14 A. Judge Zambrano and I obviously believed that Chevron was in
15 quite a better financial situation than the plaintiffs, and
16 that as a consequence of this, a larger financial benefit could
17 be obtained, especially for Mr. Zambrano and to some degree for
18 me.

19 Q. After this conversation with Judge Zambrano, what, if
20 anything, did you do next?

21 A. I contacted one of Chevron's attorneys.

22 Q. Which attorney, sir?

23 A. Dr. Alberto Racines.

24 Q. How did you know Dr. Alberto Racines?

25 A. I knew counsel Racines as well as attorneys from both

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Guerra - direct

1 litigating parties because I had been the first judge to hear
2 the case.

3 Q. How did you contact Dr. Racines?

4 A. I called him on the phone to his cell phone, and that is
5 how we set up an appointment.

6 Q. What, if anything, did you say to him in that phone
7 conversation?

8 A. On that telephone call, after the appropriate greetings, I
9 told him that I was interested in talking to him, that I had
10 been authorized to do so by Mr. Zambrano, that it was necessary
11 that we chat, that we have a conversation regarding an issue
12 for which I had been authorized by Mr. Zambrano to convey to
13 him.

14 Q. What, if anything, happened next with Mr. Racines?

15 A. We held a meeting. He invited me over to an Argentinean
16 food restaurant. On that occasion, which was the only occasion
17 in which I met with him, I made the proposal, this proposal,
18 the proposal as I stated, which was conceived by Judge
19 Zambrano.

20 Q. What was that proposal, sir, that you made to Mr. Racines?

21 A. Specifically, the proposal was that I would be a link
22 between Chevron and Mr. Zambrano for the purpose of discussing
23 or agreeing on certain important issues of the Chevron case,
24 and the judgment if need be.

25 Q. What, if anything, did he say to you after you told him

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Guerra - direct

1 that proposal?

2 A. Mr. Alberto Racines did inform me that he would convey to
3 his peers the details of the proposal. And once it had been
4 done at the appropriate time, he would give me an answer.

5 Q. In this conversation, did you tell Mr. Racines that you
6 were Judge Zambrano's ghost writer?

7 A. No.

8 Q. After your meeting with Mr. Racines, did you have any
9 further communications with Mr. Racines about the conversation
10 you had had?

11 A. No.

12 Q. Did you try to call him on the phone?

13 A. I called him on the phone several times trying to get an
14 answer, his reply, but he didn't answer.

15 Q. At some point thereafter were you able to get in touch with
16 him?

17 A. In spite of my insistence, he did not answer my telephone
18 calls. But at some later point in the future he called me on
19 my cell phone, and he did inform me that under no circumstance,
20 under no guise would Chevron agree to any sort of an agreement.

21 Q. Sir, did you report that conversation you had with
22 Mr. Racines to Judge Zambrano?

23 A. Yes.

24 Q. What did Judge Zambrano say in response?

25 MS. LITTLEPAGE: Objection. Hearsay.

DAN8CHE3

Guerra - direct

1 THE COURT: Overruled.

2 A. Judge Zambrano was very hopeful thinking with certainty
3 that it would have been accepted, and likewise I believed the
4 same. And as a consequence, once Zambrano found out this
5 reality, this rejection, he was disappointed --

6 THE INTERPRETER: I need to look up a word, your
7 Honor.

8 THE COURT: Please.

9 A. Discouraged, dispirited.

10 Q. Mr. Guerra, did you and Mr. Zambrano discuss how to proceed
11 next at that point?

12 A. Some days later, after this event that I am referring to,
13 he gave me specific instructions to meet with Mr. Pablo Fajardo
14 with whom, according to what he himself told me, he had reached
15 an agreement with Mr. Fajardo to expedite the case, the
16 proceedings in the case. And it was Mr. Zambrano's intent that
17 I should meet with Mr. Fajardo in order to define certain
18 specific aspects that would allow to expedite the case, and
19 that I should agree as well financially with Mr. Fajardo as to
20 what they would provide to me financially for my involvement in
21 the case.

22 Q. "They" being who, sir?

23 A. Mr. Fajardo.

24 Q. What was Mr. Fajardo's position at the time?

25 A. After I received those instructions from Mr. Zambrano --

DAN8CHE3

Guerra - direct

1 Q. Mr. Guerra, what was Mr. Fajardo's position at that time
2 when Mr. Zambrano told you to meet with Mr. Fajardo, who was he
3 representing?

4 A. Mr. Fajardo was the main attorney for the plaintiffs in
5 Ecuador.

6 Q. Did there come a time shortly thereafter when you met with
7 Mr. Fajardo as Judge Zambrano had instructed you to do?

8 A. Yes.

9 Q. When, approximately, was that, what month approximately?

10 A. This encounter took place between September, October, or
11 November of 2009.

12 Q. Where did you meet with Mr. Fajardo?

13 A. He called me and we met at the corner of Seis de Diciembre
14 and Rio Coca Avenues in Quito.

15 Q. What time of day was it, sir?

16 A. It was nighttime.

17 Q. Directing your attention to Plaintiff's Exhibit 95. It
18 will come up on the screen. Can you identify for the Court who
19 that is?

20 A. Yes. This is Mr. Pablo Fajardo Mendoza.

21 Q. This is who you met with that night?

22 A. Yes.

23 Q. What, if anything, happened at your meeting with
24 Mr. Fajardo that night?

25 A. Aside from greetings and comments of a personal nature,

DAN8CHE3

Guerra - direct

1 one's health and family, we specifically agreed on three
2 things: One, that I would see to issuing court orders that
3 would allow to speed up to expedite the proceedings; two, when
4 issuing the court orders, I would see that to somehow limit
5 Chevron's procedural options; and third, finally, I would
6 receive from them, from Mr. Fajardo, the sum of a thousand
7 dollars per month for my involvement in this issue.

8 Q. Did you have an understanding of how long a period it would
9 be that you would receive a thousand dollars a month from
10 Mr. Fajardo?

11 A. It was understood that I would receive that money from
12 Mr. Fajardo during the time when Zambrano was hearing the case.

13 Q. At the time you reached this agreement with Mr. Fajardo to
14 receive a thousand dollars a month from him, while you were
15 ghostwriting orders on the Chevron case, did you understand
16 that you were violating Ecuadorian law?

17 A. It hurts me to say so, but yes.

18 Q. Mr. Fajardo, did you ever discuss this agreement you
19 reached with Mr. Fajardo with any other representatives of the
20 Lago Agrio plaintiffs' team?

21 MR. MASTRO: Excuse me. I have to rephrase the
22 question.

23 Q. Mr. Guerra, did you ever discuss with any other members of
24 the Lago Agrio plaintiffs' team, besides Mr. Fajardo, the
25 agreement you reached with Mr. Fajardo?

DAN8CHE3

Guerra - direct

1 THE COURT: You mean in this time period?

2 MR. MASTRO: In this time period.

3 Q. About the thousand dollars a month to ghostwrite orders for
4 the Chevron case?

5 A. Yes.

6 Q. Please explain who, if anyone else, on the Lago Agrio
7 plaintiffs' team you met with to discuss that subject, the
8 agreement you had reached with Mr. Fajardo to receive a
9 thousand dollars a month to ghostwrite orders in the Chevron
10 case?

11 A. When I made the agreement with Mr. Fajardo regarding the
12 understanding I just mentioned, Mr. Fajardo insisted that I
13 should meet a few days later, he told me with Mr. Steven
14 Donziger, so that he can find out with my own words regarding
15 my commitment that I had made with Mr. Fajardo.

16 Q. Did Mr. Fajardo tell you why he wanted you to meet with Mr.
17 Donziger?

18 A. Mr. Fajardo stated that all important matters should be
19 brought to the attention of Mr. Donziger because he said that
20 he was the boss of the attorneys -- of the legal team.

21 Q. Did there come a time when you then met with Mr. Donziger
22 to discuss this subject of the agreement you had reached with
23 Mr. Fajardo?

24 A. Yes.

25 Q. How soon after you reached this agreement with Mr. Fajardo

DAN8CHE3

Guerra - direct

1 did you meet with Mr. Donziger?

2 A. From what I can recall, a week or two afterwards.

3 Q. Where was this meeting that you had with Mr. Donziger?

4 A. This meeting took place at the Honey Honey restaurant in
5 the city of Quito.

6 (Continued on next page)

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DANLCHE4

Guerra - direct

1 BY MR. MASTRO:

2 Q. What time of day was it?

3 A. It was early nighttime.

4 Q. Who else was in attendance at this meeting you had with
5 Mr. Donziger, if anyone?

6 A. Mr. Donziger, Mr. Pablo Fajardo, and Mr. Luis Yanza.

7 Q. Mr. Guerra, directing your attention to Plaintiff's
8 Exhibit 1686, pages 9 and 10. They're going to come up on the
9 screen.

10 Can you identify for the Court what those are
11 photographs of?

12 A. The one on the left is the facade of the Honey Honey
13 restaurant that I have mentioned. And the one on the right, it
14 relates to the back of the restaurant.

15 Q. Where did you meet with Mr. Donziger and Mr. Fajardo and
16 Mr. Yanza within that restaurant?

17 A. In this photograph I met with them on the back of the left
18 side of the restaurant.

19 Q. And, sir, do you see Mr. Donziger in this courtroom?

20 A. Yes, sir.

21 Q. Can you point him out to us and tell what he's wearing?
22 Tell us what he's wearing.

23 THE COURT: Usual way of doing that, Mr. Mastro, is
24 not for you.

25 MR. MASTRO: Understood.

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Guerra - direct

1 A. He just smiled. He is behind the lady in red. He knows
2 me. He knows me. He has seen me. We have been together.

3 THE COURT: I'm sorry. Is the translation accurate
4 that he's behind the lady in red?

5 THE INTERPRETER: Yes, your Honor.

6 Q. Can you describe what Mr. Donziger is wearing, sir?

7 A. He's wearing a dark suit, white shirt, and possibly a blue
8 tie, possibly with stripes.

9 Q. Thank you. Turning your attention to PX94, can you tell us
10 who this is a photograph of, sir?

11 A. This is Mr. Luis Yanza.

12 Q. Do you have an understanding of what Luis Yanza's role was
13 on the Lago Agrio plaintiffs' team?

14 THE COURT: Sustained.

15 Q. What understanding if any do you have of Luis --

16 THE COURT: Sustained. Personal knowledge, not
17 gossip.

18 Q. Mr. Guerra --

19 THE COURT: Otherwise admissible evidence would be
20 acceptable also.

21 Q. Do you know of your own personal knowledge what role Luis
22 Yanza had on the Lago Agrio plaintiffs' team?

23 A. I know that Luis, Mr. Luis Yanza represented the team, the
24 group of plaintiffs, but I do not know what role Mr. Yanza had
25 in within the team of the legal representatives of the

DANLCHE4

Guerra - direct

1 plaintiffs.

2 MR. MASTRO: I'll move on, your Honor.

3 Q. What if anything happened at this meeting at the Honey
4 Honey restaurant that you had with Mr. Donziger, Mr. Fajardo,
5 and Mr. Yanza?

6 A. Mr. Fajardo brought up to date or he summarized the
7 agreement that he had reached with me. He made Mr. Steven
8 Donziger and Mr. Yanza aware of this detail. And specifically
9 after hearing Mr. Fajardo, Mr. Donziger asked me if what
10 Mr. Fajardo had conveyed was correct, it was accurate. And
11 after hearing my positive answer regarding that statement,
12 Mr. Yanza and Mr. Donziger thanked me for my involvement.
13 Strike that. He thanked me for the work that I was going to
14 do.

15 Q. Did Mr. Donziger say anything else to you at this meeting
16 besides thanking you for the work you were about to do?

17 A. Yes. And I am honestly not sure if it was at this meeting
18 or the second meeting which we -- which we had at the same
19 place. Mr. Donziger heard from me a concern, a preoccupation
20 that I had regarding the immigration situation of a son of mine
21 who had been living here illegally in the United States for
22 many years.

23 And regarding this he told me he was no expert in
24 immigration issues, but that in any case he would consult with
25 an acquaintance or a friend or somebody who understood the

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Guerra - direct

1 issue and that he would convey it to me. And he did inform me
2 that he had a friendship, very interesting, that was a friend
3 with the President of the United States, Barack Obama, because
4 they had been classmates at the same university.

5 Q. Mr. Guerra, just to be crystal clear, did Mr. Fajardo say
6 at this meeting you had with Mr. Donziger the terms of the
7 agreement you'd reached with Mr. Fajardo, including that you be
8 paid a thousand dollars a month to ghostwrite orders in the
9 Chevron case?

10 MR. GOMEZ: Objection, your Honor.

11 THE COURT: Sustained as to form.

12 Q. Mr. Guerra, when you just identified that Mr. Fajardo
13 described your agreement at this meeting you had with
14 Mr. Donziger and Mr. Fajardo and Mr. Yanza, what if anything
15 did Mr. Fajardo say to describe the terms of your agreement
16 with Mr. Fajardo?

17 A. Mr. Fajardo stated, well, he said, look, Steven, we've met
18 with Mr. Guerra already and, as you know, he's the one who
19 writes for Dr. Zambrano. And we have agreed with him and he
20 agrees that -- that he will issue the court orders to expedite
21 the case. He will see to it that Chevron's procedural options
22 are limited and I or, from our side, I've committed to paying
23 him a thousand dollars per month.

24 Q. At any point during this meeting at the Honey Honey with
25 Mr. Fajardo, Mr. Donziger, and Mr. Yanza, did Mr. Donziger

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Guerra - direct

1 object at any point to any of those terms?

2 A. No.

3 Q. Did you -- what if any -- strike that.

4 What if any discussion did you have subsequently with
5 Judge Zambrano about the meeting you had with Fajardo,
6 Donziger, and Yanza at the Honey Honey restaurant?

7 MS. LITTLEPAGE: Objection, if he's going to talk
8 about what Mr. Zambrano said to him would be hearsay. The
9 question is very broad, so I didn't want to waive my objection.

10 THE COURT: Your objection is noted. Let's see what
11 the testimony is.

12 As I indicated in the discussion we had previously, I
13 view this as all being taken subject to connection at a minimum
14 under the coconspirator rule.

15 THE WITNESS: So do I answer?

16 THE COURT: Yes. I'm sorry.

17 A. I made, I informed regarding my conversation with
18 Mr. Fajardo initially and as well as my conversations with
19 Fajardo, Donziger, and Donziger later on, I always informed
20 Mr. Zambrano about that. And Mr. Zambrano was informed, he was
21 in agreement and was up to date with the agreement I had
22 reached with them.

23 Q. Mr. Guerra, what if anything happened next in terms of
24 compliance with the agreement you reached with Mr. Fajardo?

25 THE COURT: This seems to be a good place to break for

DANLCHE4

Guerra - direct

1 lunch. Ten past two.

2 MR. MASTRO: Certainly.

3 (Luncheon recess)

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DANLCHE4b

Guerra - direct

AFTERNOON SESSION

2:15 p.m.

THE COURT: Good afternoon, folks.

MR. MASTRO: Good afternoon, your Honor.

THE COURT: Before we resume, I just want to correct a tiny mistake I made this morning.

In the course of a discussion about the coconspirator issue, I made a reference to Federal Rule of Evidence 104(b). I should have referred to (a). The substance is the same, that is, not of the two rules but of the principle.

Let's go.

MR. MASTRO: Thank you, your Honor.

BY MR. MASTRO:

Q. Mr. Guerra, before the break you were testifying about the agreement you reached with Pablo Fajardo in or about September, October 2009.

Do you recall that testimony?

A. Yes.

Q. After you reached that agreement with Mr. Fajardo, what if anything did you do to fulfill your commitments under that agreement?

A. I reported everything regarding this matter to Mr. Zambrano, even the content of the conversation that I had with Mr. Fajardo, Mr. Donziger, and Mr. Yanza. And then after that, I subsequently worked on the court orders that had to be

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Guerra - direct

1 ruled on in the Chevron matters, and in so doing, I was
2 following the guidelines of my agreement with Mr. Fajardo and
3 his team.

4 Q. Did you sometimes draft orders for Judge Zambrano ruling in
5 Chevron's favor?

6 A. I drafted the court orders that Judge Zambrano was to make.
7 If I did not draft all of them, I drafted almost all of them.

8 Q. Sir, my question was were there times after you reached
9 this agreement with Mr. Fajardo where you drafted orders where
10 Chevron would win a motion?

11 MR. GOMEZ: Leading, your Honor, asked and answered.

12 THE COURT: Overruled. I think the correct
13 characterization would be asked but not answered.

14 A. As I was drafting the court orders in the Chevron case,
15 certain portions of those orders were drafted in favor or for
16 the benefit of Chevron.

17 Q. Can you explain to me why after you had a deal with
18 Mr. Fajardo that some of the orders were drafted to be in
19 Chevron's favor?

20 A. Well, you see, it could seem much too obvious if every
21 single portion of every single court order that I drafted, it
22 could not seem as though all of the orders were being issued
23 for the benefit of the plaintiffs. That would have looked
24 suspicious and the idea was to not have it look suspicious.
25 Nevertheless, some of these parts, even though they were to the

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Guerra - direct

1 benefit of Chevron, were not done for the purpose of delaying
2 the actions of the plaintiffs in the case.

3 Q. Now, Mr. Guerra, what -- strike that.

4 Mr. Guerra, after you reached your agreement with
5 Mr. Fajardo, what if anything did he do to fulfill his end of
6 the bargain?

7 A. Well, first of all, Mr. Fajardo made the payments that he
8 had offered. And also we would occasionally meet in person to
9 discuss matters of the case and to discuss matters that were to
10 be included in the court orders in the case or in regard to
11 those matters. And if there were any questions, that was
12 something we would discuss by telephone.

13 Q. Let's come back to the money. How much did he pay you, how
14 often, and for how long?

15 A. The agreement was for \$1,000 and I was paid \$1,000 per
16 month. And those payments happened and those payments were
17 made during the entire time that I was ghostwriting the court
18 orders.

19 Q. Sir, how did Mr. Fajardo make those thousand dollar monthly
20 payments to you?

21 A. He either paid me personally in cash or he would deposit
22 the money into my savings account at the Pichincha bank.

23 Q. On those occasions when you were paid in cash, who
24 specifically paid you the cash?

25 A. Mr. Pablo Fajardo.

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Guerra - direct

1 Q. Did he pay you -- rephrase.

2 When Mr. Fajardo would pay you in cash, was there a
3 particular place where you would meet to do that?

4 A. During the entire time that I had meetings with
5 Mr. Fajardo, they always took place at the same location which
6 was at the corner of Avenida Seis de Diciembre and Avenida Rio
7 Coca in the city of Quito.

8 Q. How did Mr. Fajardo give you the money and in what
9 denominations?

10 A. He would hand me a blank white envelope and inside the
11 envelope were 20 and \$50 bills.

12 Q. You also testified that sometimes Mr. Fajardo would arrange
13 for the money to be deposited into your bank account?

14 A. There were times when Mr. Fajardo would call me on my cell
15 phone and he would just tell me that a deposit had been made
16 into my savings account.

17 Q. How would he know -- how did he know what your savings
18 account deposit number was?

19 A. At one time he had asked me for my savings account number
20 and for my checking account number and clearly I gave them to
21 him.

22 Q. How much was deposited into your account on those occasions
23 when Mr. Fajardo told you there would be a direct deposit into
24 your bank account?

25 A. It was exactly the \$1,000.

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Guerra - direct

1 Q. Did Mr. Fajardo ever personally make the deposit into your
2 bank account?

3 MR. GOMEZ: Objection, calls for speculation.

4 THE COURT: Overruled.

5 A. I have no personal knowledge.

6 Q. Mr. Guerra, after Mr. Fajardo called and told you there
7 would be a direct deposit into your account, what steps if any
8 did you make to determine whether the direct deposit actually
9 occurred of a thousand dollars?

10 MR. GOMEZ: Objection, misstates prior testimony.

11 THE COURT: Rephrase it, counselor.

12 Q. Did Mr. Fajardo call you on occasion to say that the
13 thousand dollars would be direct deposited into your bank
14 account?

15 MR. GOMEZ: Objection, leading.

16 THE COURT: Overruled.

17 A. No.

18 Q. How would you -- what steps did you take to determine
19 whether there had been a thousand dollar deposit into your
20 account?

21 A. Once I found out that a \$1,000 deposit had been made into
22 my account at the bank due to the information that Mr. Pablo
23 Fajardo had given me in that regard, I would then go to a -- an
24 automatic teller for that bank, for Banco Pichincha. I would
25 then use my bank card in order to verify that a deposit had in

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Guerra - direct

1 fact been made into my account.

2 Q. Sir, did you take steps to collect deposit slips into your
3 account directly from Banco Pichincha?

4 A. I did that in mid -- approximately in mid 2012.

5 Q. You went to the bank yourself to get the deposit slips,
6 correct?

7 A. Yes, sir.

8 Q. I'd like to direct your attention to PX1713, please. It's
9 on the screen, sir. Can you see it?

10 A. Yes.

11 Q. Is this one of the deposit slips you personally went to the
12 bank to collect?

13 A. Yes.

14 Q. Do you see there in the bottom right-hand corner --

15 MS. LITTLEPAGE: Objection.

16 THE COURT: What is the objection?

17 MS. LITTLEPAGE: No. Sorry.

18 Q. Do you see there in the bottom right-hand corner a stamp
19 from Banco Pichincha signed by somebody from the bank?

20 A. Yes, sir.

21 Q. Sir, what is this document?

22 MS. LITTLEPAGE: Objection. We have an objection to
23 the document and objection to discussion of the document unless
24 it comes into evidence.

25 MR. MASTRO: Your Honor, I move it into evidence and

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Guerra - direct

1 it's a record that he personally went to the bank to get and
2 the bank has certified at the bottom that it comes from the
3 bank. And under foreign document rules under Federal Rule 902
4 of evidence and Federal Rule of Civil Procedure 44(a)(2), it
5 does not have to be a certified document to have the indicia.

6 THE COURT: Let me hear what the objection actually
7 is.

8 MS. LITTLEPAGE: Hearsay, authenticity, no business
9 record exception, no custodian of the records, no foundation.

10 MR. MASTRO: Your Honor.

11 THE COURT: Just a minute.

12 MR. MASTRO: Certainly, your Honor.

13 THE COURT: Can you speak slowly enough so that I can
14 write down all of the arguments you made.

15 MS. LITTLEPAGE: Me, sir?

16 THE COURT: Yeah, you.

17 MS. LITTLEPAGE: Hearsay, lack of authenticity, lack
18 of foundation.

19 THE COURT: How is that different from lack of
20 authenticity?

21 MS. LITTLEPAGE: Sorry, somebody was yelling in my
22 ear.

23 THE COURT: I think he was yelling very softly.

24 MS. LITTLEPAGE: He was. That's why I was trying to
25 concentrate. I'm sorry, Judge. Ask me the question again.

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Guerra - direct

1 THE COURT: I need your list.

2 MS. LITTLEPAGE: Best evidence.

3 THE COURT: What else?

4 MS. LITTLEPAGE: I think that's it, Judge.

5 THE COURT: How is lack of foundation different from
6 lack of authenticity or hearsay?

7 MS. LITTLEPAGE: I don't know, but I'm covering all my
8 bases, Judge.

9 THE COURT: Well, if the answer is I don't know, you
10 haven't covered it. That one is off the list.

11 Okay. Let's deal first with authenticity.
12 Mr. Mastro.

13 MR. MASTRO: Yes. Your Honor, first of all, in the
14 objections that the defendants actually filed in the case, they
15 did not challenge this exhibit or any of the exhibits of this
16 witness on authenticity grounds. It was not a stated
17 objection.

18 Second, your Honor, on authenticity, the witness has
19 testified that he went to the bank himself, got these records
20 directly from the bank. The bank actually certified on each
21 page that it comes from the bank with the bank officer. It is
22 a foreign record. And I think under the rules of evidence as
23 well as the rules of civil procedures, under these
24 circumstances he's more than established the foundation of his
25 own personal knowledge and based on the contents of the

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Guerra - direct

1 document itself that it's an authentic document. It's a
2 deposit slip from his account.

3 THE COURT: Whatever you've got on the screen would
4 appear not to have photocopied very well. So can I have a
5 legible copy of what's on the screen?

6 MR. MASTRO: Certainly, your Honor. I think if your
7 Honor turns to Exhibit 1713, you will see a clearer copy.

8 THE COURT: And where am I supposed to turn to that
9 in, Mr. Mastro?

10 MR. MASTRO: It's in the big binder, your Honor.

11 THE COURT: Can you narrow it down? I've got about
12 nine of those.

13 MR. MASTRO: Okay. Your Honor, it is the binder I
14 handed you at the beginning. He only has one binder for his
15 examination, your Honor.

16 THE COURT: Now I know which one.

17 Now, the reason I made the point of this was that
18 there seems to be something highlighted in yellow on the screen
19 in the lower right-hand corner and whatever that is, it didn't
20 reproduce in what you've got in the binder. And there is a
21 typewritten legend below that part of the document in the one
22 typed in the binder that isn't on the screen, at least with
23 respect to this page.

24 MR. MASTRO: Yes, your Honor. If you look at the
25 Spanish language version, you will see that.

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Guerra - direct

1 THE COURT: And that would be the one Bates stamped
2 ending in 097; is that right?

3 MR. MASTRO: It would be 096, your Honor. In the
4 Spanish language version, page 7 of 32. You will see that
5 legend there, your Honor, as well as on the subsequent pages.

6 THE COURT: All right.

7 (Continued on next page)

DAN8CHE5

Guerra - direct

1 THE COURT: I find that the requirements of
2 authentication are satisfied under Rule 901 and 902. I invite
3 you particularly to 901(a), 901(b)(1), 901(4), 902(7), 902(9),
4 and there may be others, but I think that covers it, sufficient
5 to cover it.

6 Now, what is it that the defendant claims is better
7 evidence?

8 MS. LITTLEPAGE: The original, Judge. I can't read
9 what is on this. I know the witness is about to interpret what
10 is on it, but the original would be what we would need because,
11 as the Court has already pointed out, these are very difficult
12 to read.

13 THE COURT: The Spanish language copy 096 is quite
14 legible.

15 MS. LITTLEPAGE: I was looking at Rule 1002, the
16 requirement of a original. Because under Rule 1003, we are
17 raising a question about the authenticity.

18 THE COURT: You may have been raising it, but it was
19 overruled.

20 MS. LITTLEPAGE: I want to make sure the record knows
21 I am objecting under Rule 1002 and Rule 1003.

22 THE COURT: Well, I see no genuine question as to
23 authenticity, and so the best evidence rule does not apply in
24 this context.

25 Now, Mr. Mastro, before we get on to hearsay, you

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Guerra - direct

1 asserted that this objection was in any case waived by failure
2 to object in a timely way. Spell this out for me.

3 MR. MASTRO: Your Honor had directed that the
4 defendants provide their objections to us on our exhibits.
5 They have actually filed a notice with the Court detailing
6 their objections. They did that on Monday. And they did not
7 list any of those objections other than hearsay.

8 THE COURT: We have disposed of everything but
9 hearsay. So are you telling me they preserved the hearsay
10 point but nothing else.

11 MR. MASTRO: That's correct.

12 THE COURT: Do you dispute that much, Ms. Littlepage,
13 that you didn't object on authenticity or best evidence
14 grounds?

15 MS. LITTLEPAGE: I have no personal knowledge to
16 answer the Court's question.

17 THE COURT: Somebody must at your table.

18 What about you, Mr. Gomez?

19 MR. GOMEZ: I don't have that knowledge.

20 THE COURT: In the absence of any indication to the
21 contrary, and subject to correction if it turns out to be
22 wrong, an alternative basis for my ruling as to authenticity
23 and best evidence is it's waived by the failure to make the
24 objection earlier.

25 Address the hearsay point, counsel.

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Guerra - direct

1 MR. MASTRO: The witness is here testifying that these
2 are, in fact, his bank records that he obtained and obtained
3 this information. So he is here to be cross-examined on them,
4 if they choose to cross-examine him. He has taken the steps to
5 obtain this information from the bank. He is swearing that he
6 did that, and he is swearing that this is the accurate
7 information that he received. So under those circumstances,
8 your Honor, I think they should be admissible. This is
9 information he received from his bank.

10 MS. LITTLEPAGE: It's still hearsay. They are
11 offering it for the truth of the matter asserted. It's an
12 out-of-court document. He has no personal knowledge of it. He
13 admits it's not him depositing. He has gotten this document
14 from whoever it is, and he now wants to come into court and
15 testify about it. He has no personal knowledge of any of the
16 underlying facts and the document is hearsay.

17 MR. MASTRO: He absolutely does, your Honor. He can
18 testify firsthand a thousand dollars is deposited into his
19 bank, and he went to the bank to confirm who deposited the
20 money, and got this deposit slip. So it's the information that
21 was given to him, and he is here to testify about it. I think
22 it's fairly admissible.

23 MS. LITTLEPAGE: There is no such exception to the
24 hearsay rule.

25 THE COURT: The document is a written assertion that a

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Guerra - direct

1 thousand dollars went into his bank account on a particular
2 date. That's what it is.

3 Now, I imagine, without necessarily ruling on this at
4 this point, there might be additional evidence that would be
5 elicited that would be relevant. I am sure Ms. Littlepage
6 probably has, although I don't presume to speak for her
7 obviously, things that make direct deposits to her account, and
8 she knows she has got those deposits because she goes out and
9 spends them.

10 Now, if not you, Ms. Littlepage, I can be sure that I
11 do, and most other people do. Most people in the United States
12 who get Social Security do it all the time. That might be an
13 avenue to explore.

14 MS. LITTLEPAGE: Our objection is to any comment or
15 statement by this witness as to who deposited the money. He
16 can obviously say there was a thousand dollars in his bank
17 account, and you're right, he probably took the money and spent
18 it. He can testify to personal knowledge of that.

19 THE COURT: So what you're objecting to is not the
20 written statement in this document that on a particular date, a
21 thousand dollars was deposited into the account, is that
22 correct?

23 MS. LITTLEPAGE: I am not objecting to that part of
24 the document. I am objecting to the part of the document that
25 I believe Mr. Guerra is going to interpret as giving

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Guerra - direct

1 information as to who deposited the money, which he has no
2 personal knowledge of.

3 THE COURT: That's a separate question.

4 So 1713, there is no hearsay objection and the
5 document is received.

6 Now, I gather that there may be one later that has
7 some notation on it.

8 MS. LITTLEPAGE: This one does, and we do have a
9 hearsay objection.

10 THE COURT: I don't understand. If that's so, you
11 haven't called it to my attention.

12 MS. LITTLEPAGE: You indicated that on the document
13 marked 3096, I know it's hard to read, but Mr. Guerra
14 interprets the --

15 THE COURT: Forget about what he interprets. We are
16 talking about the document alone.

17 MS. LITTLEPAGE: The document alone --

18 THE COURT: We will get to what he interprets later.

19 MS. LITTLEPAGE: We object to the part of the document
20 that on the left-hand bottom part that appears to have a
21 signature and a name, although I cannot read it, that would be
22 the signature and name of the person making the deposit that
23 Mr. Guerra would not know about other than from a hearsay
24 document.

25 THE COURT: Is there any better copy of this in the

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Guerra - direct

1 room?

2 MR. MASTRO: We are getting one for you, your Honor.
3 The better copies of the two pages of this document are on page
4 7 of 32 and on page 8 of 32.

5 THE COURT: So pages 7 and 8 are the same document, is
6 that correct, two different copies? No.

7 MR. MASTRO: They are separate deposits with the same
8 name of the depositor. On the second one, there is a cedula
9 number -- that's a tax ID number -- very clearly legible.

10 THE COURT: Ms. Littlepage, just so we are clear what
11 everybody is talking about, on pages 7 and 8 of Plaintiff's
12 1713, I now see what you are referring on the left side.

13 MS. LITTLEPAGE: It's not quite in the left bottom
14 corner.

15 THE COURT: On page 8, on the final line, I can read a
16 number, and the number is 1716841547. Do we agree?

17 MS. LITTLEPAGE: Yes.

18 THE COURT: Do we agree that that same number is
19 somewhere on page 7, or do we not agree?

20 MS. LITTLEPAGE: I cannot see anything.

21 THE COURT: You don't see a number?

22 MS. LITTLEPAGE: I don't see a number that I can read
23 on page 7.

24 THE COURT: And then above the number on page 8, there
25 is what appears to be possibly a handwritten name or signature

DAN8CHE5

Guerra - direct

1 within an oval line, and then to the right of that, what might
2 be three letters of the alphabet within an oval line. Do you
3 see that?

4 MS. LITTLEPAGE: Yes, sir.

5 THE COURT: Does anybody have any input to me about
6 what is written within those two geometric shapes?

7 MR. GOMEZ: I would suggest, your Honor, that the
8 witness be excused during this exchange, especially if the
9 witness is going to be asked that very precise question and
10 provide an answer to it. And I think that all of the confusion
11 that these copies are creating, I think begs the question where
12 is the original, and the plaintiffs have not provided any kind
13 of explanation as to why the original couldn't be provided
14 given that the supposed witness obtained these copies.

15 THE COURT: That shape has sailed.

16 Let's excuse the witness for the moment.

17 Mr. Guerra, please wait outside.

18 (Witness exits courtroom)

19 THE COURT: Mr. Mastro, you think you're able to read
20 what is in those two circles or ovals on page 8?

21 MR. MASTRO: Yes, your Honor. The witness will
22 testify, your Honor, that he, having seen the bank slips, and
23 of course he got the best copies he could from the bank, that
24 he reads the name as Ximena. And then, your Honor, he reads
25 the number just below it, which is the cedula number.

DAN8CHE5

Guerra - direct

1 THE COURT: What about in the circle to the right of
2 what you say he will say is the word Ximena? Do you know or is
3 he going to testify or is somebody going to testify?

4 MR. MASTRO: The small circle to the right of the
5 name, he is going to say he doesn't know what is in that
6 circle. He can just read the name Ximena and then he can read
7 the number below it.

8 THE COURT: And so can we all.

9 Now, is it your position that on page 7, on the same
10 line of the form on which the name Ximena allegedly appears on
11 page 8, also appears the name Ximena?

12 MR. MASTRO: Yes, your Honor. That's what the witness
13 will testify, that he reads that as Ximena when he received
14 this document.

15 THE COURT: What is the offer of proof as to what is
16 to the right of Ximena on page 7?

17 MR. MASTRO: Then he cannot read what is in the little
18 circle next to the name.

19 THE COURT: So we have got one little circle of
20 letters that's illegible on both documents. And we have this
21 number on one of the two.

22 We all agree that that's what we are dealing with, Ms.
23 Littlepage?

24 MS. LITTLEPAGE: Yes, sir.

25 THE COURT: Now, what is the hearsay analysis from

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Guerra - direct

1 your point of view, Ms. Littlepage, about the word Ximena, or
2 whatever it says, and on one of these two pages the number?

3 MS. LITTLEPAGE: Judge, from reading Mr. Guerra's
4 witness statement, on this issue Mr. Guerra says that he read
5 this signature. He actually testified he read the whole
6 signature to be Ximena Centeno. That he looked up the number
7 that's written on this form, which I would point out is written
8 in a different handwriting than the rest of the form, which he
9 says is not written in afterwards but was the way the form was
10 produced to him. And that he is here to testify that both of
11 these deposit slips were made by a woman known as Ximena
12 Centeno.

13 THE COURT: I understand all of that. I have before
14 me the offer of a document. The only part of it that remains
15 open for discussion is whether the name Ximena, or whatever it
16 is, and in the case of one of the two documents, two pages, the
17 number, is or is not an out-of-court statement made by somebody
18 for the purpose of establishing the truth of some relevant
19 proposition in this case.

20 MS. LITTLEPAGE: I believe it is, Judge. He has no
21 personal knowledge.

22 THE COURT: It doesn't matter whether he has personal
23 knowledge. We are only talking about the document. And we
24 will get this wrapped up a lot sooner if you would stop
25 shifting all the time to talking about whether there is some

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Guerra - direct

1 objection to what you think he is going to say. That's a
2 separate question.

3 MS. LITTLEPAGE: I believe this is hearsay. It is
4 being offered for the truth that someone called Ximena Centeno
5 deposited this money on this date. And on the one where you
6 can't really read the signature, again, it's an out-of-court
7 statement being offered for the truth that again this woman,
8 Ximena Centeno, deposited this money on this date.

9 THE COURT: Is there something on the form, because I
10 have a very small version of it, printed below where this
11 possible name is that says something? And if so, what does it
12 say? Can anybody help me on that?

13 MR. MASTRO: Your Honor, what I understand below there
14 is a reference for the name of the depositor to be put on that
15 line.

16 THE COURT: Do you know what it actually says? Do you
17 have it? No.

18 It seems to me that there are various possibilities
19 here. One possibility is that someone at the bank, at or after
20 the moment the deposit was made, knowing in one way or another
21 the identity of the depositor, wrote the identity of the
22 depositor in there.

23 The second possibility is that the depositor, whoever
24 it was, wrote his or her own name, if that's what it is there.

25 The third is, at the risk of being a little facetious,

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Guerra - direct

1 someone just decided to write the name of his favorite hockey
2 team in there. I don't know what it says. I understand what
3 your theory is.

4 Now, if it is a statement by somebody at the bank that
5 purports to identify the depositor, then it is an out-of-court
6 statement by the bank employee offered for the truth of the
7 identity of the depositor and it's hearsay, right?

8 MR. MASTRO: Your Honor, these records are kept in the
9 normal course by the bank.

10 THE COURT: Mr. Mastro, maybe so. If, as and when you
11 produce a witness to say that, we will talk about that issue.
12 Could you please focus on the question I am putting to you?

13 MR. MASTRO: The name that's put there on the line
14 that says *firma del depositante* -- I don't speak Spanish, but
15 that's what the line says.

16 THE COURT: What does *firma* mean?

17 MR. MASTRO: Signature on depositor.

18 THE COURT: Mr. Interpreter, what does *firma del*
19 *depositante* mean?

20 THE INTERPRETER: Signature of the depositor.

21 THE COURT: Suppose for the sake of the discussion it
22 is the signature of the depositor. I am taking your silence on
23 the previous question I put to you to be an acknowledgement
24 that if it's the bank employee writing the name in, it's
25 classic hearsay.

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Guerra - direct

1 MR. MASTRO: I am not contesting that, but we believe
2 it is the signature of the individual depositor.

3 THE COURT: Address the question of whether the
4 signature of the depositor is hearsay.

5 MR. MASTRO: I don't think it should be considered
6 hearsay, leaving aside that it is a business record. It has
7 the indicia of reliability. He went to the bank to get his own
8 deposit records. Under 807 it should come in in any event
9 because this is the record that the bank provided of how the
10 deposit was made.

11 THE COURT: I am going to let you make all your
12 arguments in due course, Mr. Mastro.

13 Can we please focus on what I am trying to work
14 through on?

15 MR. MASTRO: I understand.

16 THE COURT: If you go to your bank and you fill out a
17 deposit ticket and you sign your name on the deposit ticket
18 above a line that says "signature of depositor," and someone
19 then offers that in evidence to prove the identity of the
20 depositor, is that hearsay or is it not hearsay?

21 MR. MASTRO: To the extent it would be hearsay, I
22 think that your Honor, under these circumstances, since the tax
23 ID number on one of these slips identifies a woman named Ximena
24 Centeno, who is at Selva Viva, and who was on their witness
25 list to come to Lima, Peru and didn't show up, under these

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Guerra - direct

1 circumstances, it has the indicia of liability. There is no
2 other way for us to get this evidence. We cannot subpoena a
3 bank employee from Ecuador. They did not produce Ximena
4 Centeno themselves. The tax ID number on one of these slips is
5 hers, and is on government official records that anyone can
6 access on the official government Web site. I think this has
7 all the indicia that it should be accepted into evidence.

8 And it is also a statement of a co-conspirator in this
9 context. She is working for Selva Viva. That is Donziger's
10 organization. In furtherance of the conspiracy by making the
11 deposit at Fajardo's request. She is an employee of Selva
12 Viva.

13 THE COURT: Is there any dispute about that, Ms.
14 Littlepage? Was she an employee of Selva Viva at this date?

15 MS. LITTLEPAGE: We do agree that there was an
16 employee with this name, which is a very common name in
17 Ecuador.

18 THE COURT: How about with this identification number?

19 MS. LITTLEPAGE: I don't know, because we are not
20 going to have another hearsay statement by Mr. Guerra based on
21 no personal knowledge of looking up this number.

22 THE COURT: I have taken your objection very seriously
23 because this is a very serious point, and I understand its
24 importance to both sides, but I am not going to take seriously
25 a "who the heck knows" kind of argument about something that is

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Guerra - direct

1 objectively verifiable, like the national identity number of an
2 employee of your client's company down there. I am just not.

3 If you're going to come to me in good faith and say
4 it's not the number, or in good faith, we don't know and we
5 can't find out, that's one thing. But if we are just throwing
6 dust up, that's a different thing. And I hope that it's not
7 the latter.

8 MS. LITTLEPAGE: I don't know the answer. I do know
9 that there is a public record that you can look up numbers. If
10 you wanted to look up a number, for example, to write on a
11 deposit slip, for example, you could look it up, and you can
12 get a name and you can get a number. And seeing that we have
13 no personal knowledge that this is the person who signed this
14 form, it's hearsay.

15 THE COURT: She works for you or for Mr. Gomez's
16 people, I'm not sure at the moment exactly where, works for
17 you. You know or can find out with a phone call what the
18 identification number is. This is just more of the same. If
19 it's in Ecuador, your position is, and your client's position
20 has been for three years, we are not telling. And this is not
21 Cambodia 40 years ago.

22 MS. LITTLEPAGE: That's not my argument. My argument
23 is there is apparently a Web site you can get on.

24 THE COURT: So what? I want to know if it's her
25 number. That's a simple question. Is it her number?

DAN8CHE5

Guerra - direct

1 MS. LITTLEPAGE: Yes. There is a woman who worked for
2 Selva Viva, whose name is Ximena Centeno, whose number this is.
3 We believe this is hearsay because we do not believe there is
4 any evidence that that woman deposited this money at this bank.

5 THE COURT: Look, I am not going to spend the whole
6 afternoon on this discussion. I am just not. You can brief
7 these matters. The documents are in, subject to the fact that
8 I am reserving pending just a little more discussion and
9 whatever briefs I get on the question of whether that name, if
10 that's what it is, and the number on the second page are or are
11 not hearsay, and are or are not within some exception.

12 We have spent enough time on it. I strongly suggest
13 that you, on both sides, focus on the strict, careful
14 step-by-step analysis, instead of listening to every question
15 that I ask, and if you're not ready to answer it, or you don't
16 want to answer it, talking about something else. You have both
17 done it. Lawyers do it all the time. I understand why it
18 happens. But if you want to convince me, either side of you,
19 you're going to have to take this like a law school exam and
20 analyze it properly. And the result of a failure to do that
21 you may not be happy with, either way.

22 Now, I heard the 804(d)(2)(E) issue raised, and it
23 seems to me that warrants some attention from both sides. I
24 heard an 807 issue raised, and that ought to be addressed.

25 Now, in that connection, Mr. Mastro, you need to

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Guerra - direct

1 address, in addition to everything else, the notice question.

2 Ms. Littlepage, without having reached a conclusion on
3 this by any stretch of the imagination, you ought to focus on
4 the question why this woman did not show up for her deposition
5 when that opportunity was presented.

6 So they are received subject to the caveat and let's
7 move on.

8 MS. LITTLEPAGE: At the time that she was noticed for
9 her deposition, she was no longer working for us, and we had no
10 control over her.

11 THE COURT: That's the time to do it.

12 (Plaintiff's Exhibit 1713 received in evidence)

13 THE COURT: Let's get the witness back.

14 ALBERTO GUERRA, resumed.

15 BY MR. MASTRO:

16 Q. Mr. Guerra, directing your attention to Plaintiff's Exhibit
17 1713.

18 MR. MASTRO: Can we enlarge the deposit slip, please?

19 Q. Mr. Guerra, what is this document?

20 A. This is a copy of a deposit slip, specifically, it's used
21 at the Banco Pichincha. It states here that the deposit may be
22 made in cash --

23 MS. LITTLEPAGE: Objection. Hearsay.

24 Q. -- by check or in coins.

25 THE COURT: The objection is sustained. Let's not

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Guerra - direct

1 have any reading from the document.

2 Q. Sir, the signature of the depositor on the document, can
3 you read that signature?

4 MS. LITTLEPAGE: Objection. Hearsay. The document
5 speaks for itself.

6 THE COURT: I am sustaining the objection on form
7 grounds because it assumes that it is a signature of the
8 depositor.

9 MR. MASTRO: Certainly, your Honor.

10 Q. Mr. Guerra, can you read what is written on this document
11 on the line above *firma del depositante*?

12 MS. LITTLEPAGE: Same objection. Form. The document
13 speaks for itself.

14 THE COURT: There is no objection to form. I solicit
15 anybody's help in reading what is on that line. If the
16 document adequately spoke for itself on this, we wouldn't have
17 to inquire.

18 MS. LITTLEPAGE: Lack of personal knowledge.

19 THE COURT: I think maybe I need to instigate a rule
20 here that any lawyer who asks a witness to read something from
21 a document it costs a thousand dollars per question, and then I
22 think we will solve this question, but I am not going to do
23 that.

24 Look, the handwriting is whatever it is. It could be
25 that whatever he or you or somebody else says may help me read

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Guerra - direct

1 it. I am prepared to hear it on that basis. That's all.

2 If he tells me that he has other experience with the
3 signature of the individual, if he tells me he saw it signed,
4 if he tells me anything like that, of course it means something
5 else.

6 THE COURT: Please answer the question, sir.

7 A. I do not identify it fully in this document.

8 THE COURT: We are talking about page 7 of Exhibit
9 1713.

10 MR. MASTRO: Correct, your Honor.

11 Q. Would you please go to page 8 of this document?

12 Mr. Guerra, can you identify this document?

13 A. Yes.

14 Q. Please tell us what it is.

15 A. It's a receipt for a bank deposit.

16 Q. Mr. Guerra, please tell us how you read the handwriting on
17 the line above *firma del depositante*?

18 MS. LITTLEPAGE: Same objection.

19 THE COURT: I will sustain that objection because I
20 can read this one.

21 Q. Mr. Guerra, when you got this deposit slip from the bank,
22 what steps, if any, did you take to confirm the identity of who
23 had made this deposit?

24 MS. LITTLEPAGE: I don't want to wait until after the
25 answer, but there is nothing he can do that would give him

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Guerra - direct

1 personal knowledge because he said he didn't get this until
2 2012.

3 THE COURT: I don't think you know that, counsel.

4 MS. LITTLEPAGE: He testified to that earlier when we
5 started this process, that he went to the bank and got these
6 slips in 2012.

7 THE COURT: I agree with you about that.

8 For all I know, he went to this lady Ximena in 2012
9 and said, Is this your signature on the slip?

10 So let's get the answer. Or maybe he compared it with
11 known exemplars or maybe he took it to a handwriting expert.
12 Let's get the answer.

13 MR. GOMEZ: Objection.

14 THE COURT: What is the objection?

15 MR. GOMEZ: The possibilities of what the response may
16 be.

17 THE COURT: The point is, counsel made an objection
18 that for the reasons I indicated is patently not well-founded.
19 Let's move on.

20 A. At that time, I entered the citizen's identification number
21 that appears on the document via the Internet in the Internal
22 Revenue Service of Ecuador Web site.

23 MS. LITTLEPAGE: Objection. No personal knowledge.
24 Hearsay. Lack of foundation.

25 THE COURT: Overruled.

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Guerra - direct

1 Q. Can you explain to the Court what a cedula number is?

2 THE COURT: A what?

3 MR. MASTRO: Cedula number.

4 THE COURT: Can you spell it?

5 MR. MASTRO: C-E-D-U-L-A.

6 A. In Ecuador, it is an identification number that it's
7 exclusively assigned to the state to each individual,
8 specifically, of Ecuadorian nationality, and which is used to
9 identify the person throughout his or her life.

10 Q. Is there an official government Web site that one can
11 access to determine who the identity of the person is by cedula
12 number?

13 A. Yes, sir.

14 Q. Is that the official government Web site that you went to
15 with the cedula number to determine the identification of this
16 individual?

17 A. Yes.

18 Q. Were you able to determine the identification of this
19 individual from going to that Web site?

20 MS. LITTLEPAGE: Objection. Hearsay. Lack of
21 foundation. The document will speak for itself.

22 THE COURT: What document would that be, Ms.
23 Littlepage?

24 MS. LITTLEPAGE: The Web site that he is apparently
25 going to.

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Guerra - direct

1 THE COURT: How do we physically bring it in and mark
2 it as an exhibit?

3 MS. LITTLEPAGE: Under one of these tabs, Judge.

4 THE COURT: For God sake.

5 Look, folks, I know it's a hard-fought case. You're
6 all doing the right thing by fighting hard, but there comes a
7 point where you are just wasting time. I thought we had an
8 agreement that this is the number of this woman Ximena, who at
9 least formerly worked for the defendants. Is that not right?

10 MS. LITTLEPAGE: Yes, sir.

11 THE COURT: Mr. Gomez, is that right?

12 MR. GOMEZ: Yes.

13 THE COURT: Why are we wasting all this time? You
14 have now agreed it's the number, and we have spent 20 minutes
15 on objections to what he did to verify what you all agree is
16 the case anyway. It's like we were having objections here
17 about whether a witness had personal knowledge that today is
18 Wednesday.

19 MR. MASTRO: Your Honor, I would also move into
20 evidence Exhibit 1742, which is the Web site.

21 THE COURT: You don't need it. You have a
22 stipulation.

23 MR. MASTRO: I will move on.

24 THE COURT: We will take our break here. Please talk
25 to each other. This is not so hard.

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Guerra - direct

1 (Recess)

2 THE COURT: Let's continue.

3 MR. MASTRO: Thank you, your Honor.

4 BY MR. MASTRO:

5 Q. Before we leave Plaintiff's 1713, Mr. Guerra, I want to
6 refer you to page 9.

7 MR. MASTRO: Can you please bring that up?

8 Q. Mr. Guerra, I am referring you to the line *firma del*
9 *depositante*. Do you recognize the handwriting on that deposit
10 slip?

11 MS. LITTLEPAGE: Objection. The document speaks for
12 itself. Hearsay. Lack of personal knowledge.

13 THE COURT: Who is offering an out-of-court statement
14 for the truth of the proposition that he either does or doesn't
15 recognize the handwriting?

16 MS. LITTLEPAGE: If his answer is just yes or no,
17 that's fine.

18 THE COURT: Ma'am, you have a little incantation and
19 it's not helping.

20 Overruled. Please answer the question.

21 A. Yes, sir.

22 Q. Whose handwriting is it that you recognize there?

23 MS. LITTLEPAGE: Objection. Hearsay. Lack of
24 personal knowledge. The document speaks for itself.

25 THE COURT: That's a ludicrous objection. Overruled.

DAN8CHE5

Guerra - direct

1 A. It represents or is the signature of the depositor, Nicolas
2 Zambrano.

3 THE COURT: I'm sorry?

4 THE INTERPRETER: It represents or is the signature of
5 the depositor.

6 THE COURT: Can I have the question back from the
7 reporter, please.

8 (Record read)

9 THE COURT: Now I have the answer.

10 MR. GOMEZ: I move to strike reference to name of the
11 depositor. He was asked to identify the signature.

12 THE COURT: Your statement of what he was asked to
13 identify is not accurate. It's not what he was asked.

14 Let's have the question and answer back.

15 (Record read)

16 MR. GOMEZ: I move to strike everything but the name.

17 THE COURT: All right. I will strike everything but
18 the name. He recognizes Nicolas Zambrano's handwriting on it.

19 Q. Do you see there on the document there is a cedula number
20 under the signature?

21 THE COURT: Maybe it would be useful to identify what
22 handwriting on here he recognizes as that of Mr. Zambrano.
23 Don't you think that would be a good idea?

24 Q. Mr. Guerra, what handwriting on this document do you
25 recognize as being the handwriting of Nicolas Zambrano?

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Guerra - direct

1 A. The signature specifically.

2 Q. Now, sir, did you do anything after you got this deposit
3 slip from the bank to confirm the identity of the depositor?

4 A. Yes.

5 Q. Just to be clear, how is it that you recognize that to be
6 the signature of Nicolas Zambrano?

7 A. I have seen it. I have seen it many times. That is his
8 characteristic signature.

9 Q. Sir, what steps did you take to confirm the identity of the
10 depositor after you got this deposit slip from the bank?

11 MS. LITTLEPAGE: Can we ask for a time frame when he
12 would have done this investigation?

13 THE COURT: Sure.

14 Mr. Mastro.

15 MR. MASTRO: Certainly.

16 Q. Sir, please, first tell the Court when it was that you
17 obtained this deposit slip, approximately?

18 A. I obtained this deposit slip and other similar to these
19 ones approximately around mid-December of 2012.

20 Q. Sir, what steps did you take once you received this
21 document to confirm the identity of the depositor, if any?

22 A. In this specific case, I went into the Internal Revenue
23 Service web page of Ecuador, and I identified that the
24 citizen's identification number that appears in this document
25 corresponds to Nicolas Augusto Zambrano Lozada.

DAN8CHE5

Guerra - direct

1 Q. Turning to PX --

2 MR. GOMEZ: Time frame, please, for the
3 identification.

4 THE COURT: When did this happen, Mr. Guerra?

5 THE WITNESS: Once I was already here in the United
6 States.

7 Q. Now, Mr. Guerra, where on this document is the citizen's
8 identification number, the cedula number that you said you used
9 to go into the Internal Revenue Service government database?

10 A. It is on the lower right-hand corner and below the
11 depositor's signature.

12 Q. Mr. Guerra, referring you to Plaintiff's Exhibit 1743.

13 THE COURT: I couldn't hear you.

14 MR. MASTRO: I am referring him to Plaintiff's Exhibit
15 1743. It just came on the screen.

16 Q. Can you please identify for the Court what that document
17 is, please?

18 A. This is the page from the Internal Revenue Service of
19 Ecuador Web page, and it shows the name of the person regarding
20 tax payments related to the previously immediate year.

21 Q. Sir, when you went to this government Web site, did you
22 confirm that the number here, the cedula number for Mr.
23 Zambrano, matched the number that was on the deposit slip?

24 A. Yes, sir.

25 MR. MASTRO: I ask that 1743 be received.

DAN8CHE5

Guerra - direct

1 MS. LITTLEPAGE: Objection. Hearsay.

2 MR. MASTRO: Material appearing on an official
3 government Web site may be authenticated under Federal Rule
4 902(5).

5 THE COURT: Authenticity and hearsay are two different
6 propositions, aren't they?

7 MR. MASTRO: This is an official government record
8 that is kept in the normal course and made available to the
9 public.

10 THE COURT: Ms. Littlepage, here is the deal. You are
11 going to either stipulate to this number, and Mr. Gomez, or
12 you're going to give me a good faith basis for questioning it,
13 or you're both personally going to pay whatever it costs to
14 prove it. Are we clear?

15 MS. LITTLEPAGE: Yes, sir.

16 THE COURT: If there is a good faith basis, I have no
17 problem with you at all. None. I want that to be perfectly
18 clear.

19 MS. LITTLEPAGE: Yes, sir. Can I look at it
20 overnight?

21 THE COURT: Absolutely.

22 MR. MASTRO: I will move on, your Honor.

23 BY MR. MASTRO:

24 Q. Mr. Guerra, I would like to return to the orders you
25 drafted for Judge Zambrano in the Chevron case.

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Guerra - direct

1 Can you tell the Court approximately how many orders
2 you drafted for Judge Zambrano in the Chevron case?

3 A. I drafted all the court orders that he requested that I
4 draft during both periods.

5 Q. Approximately how many orders in total?

6 THE COURT: Let me just interrupt for a minute.

7 Ms. Littlepage, let's be clear. Mr. Zambrano is your
8 witness. You're bringing him here to testify. He is a phone
9 call away. He knows what his number is. You, among many other
10 ways, can find out from him, right from the horse's mouth,
11 whether this is his number. The idea that you're here making
12 objections if you haven't done that is really objectionable.
13 And you have got to do it and you have got to give me some real
14 basis to think this is inaccurate.

15 MS. LITTLEPAGE: Yes, sir.

16 THE COURT: If it is.

17 MS. LITTLEPAGE: Judge Zambrano is not our witness.
18 We are making arrangements to bring him. But even to assume
19 that we control Judge Zambrano --

20 THE COURT: I didn't say control. He is your witness.
21 He is on your witness list. You moved for leave to bring him
22 here to testify, despite his failure to show up for his
23 deposition when it was noticed. He is your witness. Now, that
24 doesn't mean that you control him or anything else necessarily.
25 You're the one calling him. You're the one who proposes to

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Guerra - direct

1 bring him here.

2 MS. LITTLEPAGE: That is true.

3 THE COURT: And I have granted your application for
4 him to testify. And Mr. Gomez has gone on at some length about
5 the fact that he has had conversations with him. You know how
6 to find out if this is really his number if you don't know
7 already.

8 MS. LITTLEPAGE: I have never spoken to Judge
9 Zambrano, but I will make an effort --

10 THE COURT: That was the imperial you. You know who I
11 am talking about.

12 MS. LITTLEPAGE: OK.

13 THE COURT: I have no objection to lawyers fighting
14 hard. What I have objections to is lawyers fighting about
15 nothing for the sake of the fight.

16 Let's go.

17 MR. MASTRO: Thank you, your Honor.

18 BY MR. MASTRO:

19 Q. Mr. Guerra, directing your attention to Judge Zambrano's
20 first term presiding over the Chevron case.

21 THE INTERPRETER: Excuse me, counsel.

22 Your Honor, there was an answer that was given before.

23 THE COURT: To what?

24 THE INTERPRETER: To the previous question as to how
25 many court orders Mr. Guerra had drafted for Mr. Zambrano

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Guerra - direct

1 pertaining to the Chevron case, and there was an answer given.

2 A. A couple dozen.

3 THE COURT: Thank you.

4 MR. MASTRO: Thank you, Mr. Interpreter.

5 BY MR. MASTRO:

6 Q. Mr. Guerra, directing your attention to Judge Zambrano's
7 first term presiding over the Chevron case, how did you go
8 about drafting the orders in the Chevron case?

9 A. I would receive from him, when I met him on Friday late
10 afternoons at the Quito airport, and the reason was that Mr.
11 Zambrano was traveling from the city of Lago Agrio to the
12 cities of Manta or Guayaquil, I would receive from him in
13 person the documents or the case files that contained the
14 motions by the parties, the filings that the parties have
15 submitted during the previous week, the last week. And I would
16 study those documents in my home, in my residence in the city
17 of Quito. I would prepare the court orders that needed to be
18 made, working on these documents in chronological order in
19 which they had been filed by the plaintiffs and the defendants.
20 And finally the document would come out or I would make a
21 physical copy of the document.

22 Finally, I would record it into a flash drive, a thumb
23 drive. And on Sunday, late afternoon or early evening, when
24 Mr. Zambrano would return to Lago Agrio, I would give him those
25 documents that I had worked on with the result, with the hard

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Guerra - direct

1 copy of the documents that I had worked on, in order so that
2 he, following the very next week, or the very next Monday, he
3 would then issue the corresponding court orders and notice the
4 parties.

5 (Continued on next page)
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DANLCHE6

Guerra - direct

1 Q. Was this the same procedure you followed drafting orders
2 for Judge Zambrano on his other civil cases during his first
3 term on the Chevron case?

4 A. Yes.

5 Q. Sir, during Judge Zambrano's first term, on what platform
6 or method did you do the drafting of the orders?

7 A. Well, well, I was not and I'm not very skilled, very
8 capable, very technical as far as using a computer. Because of
9 that, what I would do is to copy the last court order that I
10 had drafted and on top of that I would work the recent, the
11 contemporaneous, the fresh documentation that had been given to
12 me by Judge Zambrano.

13 Q. Am I correct you worked on your personal computer at your
14 home during Judge Zambrano's first term in drafting orders for
15 him?

16 A. Yes.

17 Q. When you would meet Judge Zambrano on Fridays to get files
18 and then on Sundays to give him back files and draft orders,
19 was there a particular place in Quito where you would meet
20 typically during his first term?

21 A. Yes.

22 Q. Where was that, sir?

23 A. Generally outside the Quito airport, the Mariscal Sucre
24 Airport, or also across from the airport at a shopping center
25 called airport shopping center.

DANLCHE6

Guerra - direct

1 Q. Mr. Guerra, what other means, if any, did you have for
2 getting files from Judge Zambrano and returning files and draft
3 orders to Judge Zambrano during his first term?

4 A. Specifically, if it was not possible for Zambrano to give
5 me, to receive them directly from Zambrano coming from him, he
6 would send me the packages with the corresponding documentation
7 through a -- through an airline Toma. It's a shipping and
8 delivery airline.

9 Q. In addition to him shipping documents to you by Toma
10 airline service, was there anyone else at the Lago Agrio
11 courthouse who would ever ship you documents on behalf of Judge
12 Zambrano during his first term on the Chevron case?

13 A. No.

14 Q. Sir, did you ever ship documents back to Judge Zambrano
15 with draft orders during his first term in the Chevron case?

16 A. Yes.

17 Q. Did you use this same delivery service, Toma?

18 A. Excuse me, I didn't, I didn't understand.

19 Q. Did you use the same delivery service to ship back to him
20 that he used to ship to you during his first term on the
21 Chevron case, Toma?

22 A. Yes.

23 Q. Did you -- was there anyone else besides Judge Zambrano to
24 whom you sometimes shipped files and draft orders for Judge
25 Zambrano at the Lago Agrio courthouse during Judge Zambrano's

DANLCHE6

Guerra - direct

1 first term on the Chevron case?

2 A. Yes, I did, sir, yes.

3 Q. Who are the other persons to whom you would sometimes ship
4 files and draft orders for Judge Zambrano at the Lago Agrio
5 courthouse during his first tenure on the Chevron case?

6 A. They are Narcisa Leon and Fernando Alban.

7 Q. Who was Narcisa Leon?

8 A. She's an employee of the Court of Justice of Sucumbios.

9 Q. And who is Fernando Alban?

10 A. Likewise, he's an officer. He's a judge of the Court of
11 Justice of Sucumbios.

12 Q. Now, Mr. Guerra, when did Judge Zambrano's first term end
13 presiding of the Chevron case?

14 A. He finished exactly on February 18 of 2010.

15 Q. Why did Judge Zambrano stop presiding over the Chevron case
16 on that date?

17 A. Because on that date, Leonardo Ordonez Pena was appointed a
18 new associate judge of the court.

19 Q. At the time --

20 THE COURT: What's the connection between the two
21 events, Mr. Guerra?

22 MR. MASTRO: Yes.

23 THE WITNESS: When Mr. Ordonez was appointed as a
24 president of the Court of Justice, he was at the same time
25 precisely being handed the Chevron case for him to hear.

DANLCHE6

Guerra - direct

1 Q. Sir, when Judge Ordonez became presiding judge over the
2 Chevron case, did he have a term of years in which he would
3 serve in that capacity?

4 A. Yes, sir, two years.

5 Q. During Judge Zambrano's first term presiding over the
6 Chevron case, did he know that his term on the Chevron case
7 would be ending by a date certain?

8 MS. LITTLEPAGE: Objection, lack of personal
9 knowledge, hearsay.

10 THE COURT: Sustained as to the lack of personal
11 knowledge.

12 MR. MASTRO: Certainly, your Honor.

13 Q. During Judge Zambrano's first term presiding over the
14 Chevron case, did you ever witness him preparing the judgment
15 in the Chevron case or reviewing the entire record in the
16 Chevron case?

17 MR. GOMEZ: Objection, leading, your Honor.

18 THE COURT: Overruled.

19 A. No.

20 Q. During Judge Zambrano's first term presiding over the
21 Chevron case, did you ever discuss with Judge Zambrano whether
22 he could possibly issue the judgment in the Chevron case during
23 that first term?

24 THE COURT: That's a yes or no, please.

25 A. Yes.

DANLCHE6

Guerra - direct

1 Q. What if anything did you discuss with Judge Zambrano during
2 his first term on the Chevron case, from October 2009 to
3 February 2010, about whether he could possibly issue the
4 judgment in the Chevron case?

5 MS. LITTLEPAGE: Objection, form, hearsay.

6 THE COURT: What's the form objection?

7 MS. LITTLEPAGE: Well, it's a compound question
8 because he's asking him to discuss everything he and Judge
9 Zambrano discussed in a five-month period of time.

10 THE COURT: No, he isn't. He was asked whether he
11 ever discussed a specific subject in that period.

12 MS. LITTLEPAGE: And hearsay, Judge.

13 THE COURT: What's the answer to the hearsay
14 objection?

15 MR. MASTRO: Well, these are coconspirators, your
16 Honor, discussing potential issue in the Chevron judgment.

17 THE COURT: I'm sorry. I can't hear you.

18 MR. MASTRO: These are coconspirators discussing the
19 issuance of the Chevron judgment at the very time when the
20 witness previously testified he was soliciting bribes on Judge
21 Zambrano's behest as well.

22 THE COURT: How is this particular conversation,
23 assuming there was any, in furtherance of the conspiracy?

24 MR. MASTRO: Your Honor, it's -- I'll withdraw the
25 question.

DANLCHE6

Guerra - direct

1 Q. Now, Mr. Guerra, when you were ghostwriting for Judge
2 Zambrano during his first term on the Chevron case, had Chevron
3 yet made a recusal motion to recuse Judge Ordonez from taking
4 over the case?

5 MS. LITTLEPAGE: Objection to the form.

6 THE COURT: Sustained as to form.

7 MR. MASTRO: I'll withdraw, your Honor.

8 Q. What happened in the Chevron case that caused Judge
9 Zambrano to resume presiding over the case in October 2010?

10 MS. LITTLEPAGE: Objection to hearsay if the question
11 asks for hearsay. It's hard for me to know. It's not a yes or
12 no question. If he has personal knowledge, it would not be
13 hearsay. But if he's going to report something someone else
14 told him, it would be.

15 THE COURT: Ask it another way, Mr. Mastro.

16 MR. MASTRO: Sure.

17 Q. Mr. Guerra, do you know of your own personal knowledge what
18 happened in the Chevron case that caused Mr. Zambrano to resume
19 presiding over the case in October 2010?

20 A. Yes, sir.

21 Q. Tell us what you know of your own personal knowledge on
22 that subject.

23 A. Chevron recused Judge Ordonez. When that recusal was
24 admitted, Ordonez stopped hearing the Chevron case. And
25 consequently, by law, that case came to be heard by the

DANLCHE6

Guerra - direct

1 substituting judge who precisely was Mr. Nicholas Zambrano.

2 Q. Sir, what role if any did you play in helping Judge
3 Zambrano write the order relating to recusal of Judge Ordenez
4 in the Chevron case?

5 THE COURT: I think you're jumping a step ahead,
6 Mr. Mastro.

7 MR. MASTRO: I'll step back. I'll step back, your
8 Honor.

9 Q. Mr. Guerra, of your own personal knowledge, who wrote the
10 order that resulted in Judge Ordenez being recused from the
11 Chevron case -- let me withdraw it, your Honor.

12 Of your own personal knowledge, which judge signed the
13 order requiring Ordenez to be recused from the Chevron case?

14 A. Nicolas Zambrano.

15 Q. What role if any did you play in drafting the order of
16 recusal of Judge Ordenez from the Chevron case?

17 A. I guided Mr. Zambrano regarding the recusal procedures --
18 strike that -- process, and also when in relating to the
19 drafting of the order accepting the recusal, admitting the
20 recusal.

21 Q. What discussion if any did you have -- withdrawn.

22 What if anything did Judge Zambrano tell you at the
23 time you drafted the recusal order for him?

24 MS. LITTLEPAGE: Objection, hearsay.

25 THE COURT: Overruled to the extent that I'm taking it

DANLCHE6

Guerra - direct

1 subject to connection.

2 And to be clear, the case law is absolutely crystal
3 clear that as long as there is a conspiracy -- I'll hold this
4 for another time, but I'm taking it subject to connection.

5 A. Please could you repeat the question?

6 Q. Certainly.

7 What if anything did Judge Zambrano tell you at the
8 time you drafted the recusal order for him to issue concerning
9 Judge Ordonez?

10 MS. LITTLEPAGE: Just for the record, same objection.

11 THE COURT: Same ruling.

12 A. Well, there were specifically two topics. One was that
13 Mr. Zambrano had asked me to help him in that matter because he
14 was not very skilled in regard to civil matters, specifically
15 civil law, and then also in regard to procedure. His basic
16 studies were in the criminal law area.

17 THE COURT: Excuse me, Mr. Guerra, the question is
18 what Judge Zambrano told you. Let's stick to that. If this is
19 what he told you, that's one thing. But if this is just
20 something else you want to say, let's move to what he told you.

21 THE WITNESS: Yes, your Honor. A very good chance to
22 take over the Chevron case once again.

23 THE COURT: Is that something he said to you or is
24 that something else?

25 THE WITNESS: No, this was Mr. Zambrano, when speaking

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Guerra - direct

1 to Judge Ordóñez's recusal, he said it was a very good
2 opportunity to take -- to take over the Chevron case again, to
3 again hear the case.

4 THE COURT: All right. Let's break with the witness
5 here.

6 Mr. Guerra, you're through for the day. You'll be
7 back tomorrow and you should leave the courtroom now.

8 (Witness not present)

9 THE COURT: Mr. Mastro, for my benefit, how do you
10 propose, if at all, to connect this last conversation to the
11 defendants if you're relying on the coconspirator exception,
12 and if you're not, what's the other basis for it?

13 MR. MASTRO: Your Honor.

14 THE COURT: Please step back to the lectern. I can't
15 hear you.

16 MR. MASTRO: Your Honor.

17 THE COURT: My hearing is not up to you sometimes.

18 MR. MASTRO: Sometimes I'm soft spoken, your Honor.

19 THE COURT: We'll take a vote on that.

20 MR. MASTRO: Your Honor, I believe that the witness
21 will testify as we continue the direct that the opportunity
22 that Judge Zambrano saw was not really presiding over the case,
23 but to make money off the case, to bribe, to solicit.

24 The next area of inquiry would have been the next
25 marching order. He comes back on the case. There's another

DANLCHE6

1 overture to Chevron, and then there's the deal struck with the
2 Lago Agrio plaintiffs team. And that's where we were going,
3 your Honor. So we were very close to that moment, but that's.

4 THE COURT: Okay. But, look, are you relying entirely
5 on a coconspirator rule or not?

6 MR. MASTRO: Your Honor, in that regard.

7 THE COURT: Or are you not offering it for the truth?

8 MR. MASTRO: I am offering it for the truth. I
9 believe that the very next question he would have said that the
10 opportunity Zambrano saw was to solicit a bribe and make money
11 off the case. Go back to Chevron if you can and then go to the
12 other side. That would be the testimony. So I think it's both
13 statements against interest as well as coconspirator
14 statements.

15 THE COURT: Statement against interest by Zambrano.

16 MR. MASTRO: Correct, your Honor.

17 MS. LITTLEPAGE: And, Judge, statement against
18 interest is only if declarant is unavailable.

19 THE COURT: I understand that.

20 MR. MASTRO: He's unavailable to us, your Honor.

21 THE COURT: Look, can I please ask of all of you that
22 you go back tonight and get better educated than I'm at least
23 sensing, rightly or wrongly, you may be on some of the
24 evidentiary rules that govern here. I hope I'm mistaken in
25 thinking that you need it.

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1 But my general understanding of the rule, as I think I
2 told you this morning, it's an out-of-court statement by a
3 coconspirator made during the course and in furtherance of a
4 conspiracy with the defendant is not hearsay and is admissible
5 for the truth of the matters.

6 Ms. Littlepage suggested that Mr. Zambrano, and she
7 may not have sublimated it, but certainly she said Mr. Zambrano
8 is not charged as a coconspirator in the complaint and so
9 forth. The law in this circuit is abundantly clear that that
10 is unnecessary as long as there was a conspiracy between the
11 party against whom the statement is offered and the declarant
12 and the statement is in furtherance, it comes in as nonhearsay.

13 Now, I can certainly understand the analysis of the
14 statements attributed to Mr. Zambrano giving instructions as to
15 what to do once an agreement had been reached. I'm talking
16 about the first period only. It is not self-evident that
17 statements made by Mr. Zambrano to Mr. Guerra, though perhaps
18 in furtherance of a conspiracy among themselves to work this
19 case for whatever it was worth to them are chargeable to the
20 defendants at that point. I'm just not clear on it one way or
21 the other.

22 It may also be that what went on, if anything, between
23 Zambrano and Guerra preparatory to the overtures to Chevron and
24 then to the plaintiffs is in fact not being offered for the
25 truth of the statements made but for the purpose of showing how

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1 it came to be that Guerra approached first Chevron and then the
2 defendants.

3 MR. MASTRO: Correct, your Honor.

4 THE COURT: I am just asking you all, as I did in
5 relation to the signature on the deposit slip, to help me
6 consider these things properly in their appropriate analytical
7 context and give me the relevant authority that you rely on
8 instead of a bunch of general statements that in some cases
9 don't fit the facts, don't fit the legal context.

10 There is nobody who is more conscious in this
11 courtroom, but there are several people as conscious of the
12 importance of this testimony and these documents to both sides.
13 I expect it to be hard fought. But I am looking for genuine
14 assistance, not rhetoric. Okay? Help me out with it. That's
15 your job. It goes for everybody.

16 Okay. I'll see you tomorrow at 9:30.

17 MR. MASTRO: Thank you, your Honor.

18 (Adjourned to October 24, 2013, at 9:30 a.m.)
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5000 and 1101	892
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